United States Court of Appeals
for the Second Circuit

PETITIONER’S BRIEF AND APPENDIX

ORIGINAL

76-4260

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United States Court of Appeals

FOR THE SECOND CIRCUIT

BAGEL BAKERS COUNCIL OF GREATER NEW YORK, BAGEL BOX, INC., BAGEL TOWN, INC., BENSON BAGEL BAKERY, INC., CULVER BAGEL BAKERY, INC., FAR ROCKAWAY BAGEL BAKERY, INC., GOLDEN BAGEL BAKERY, INC., ISLAND PARK NASSAU BAGEL BAKERY, INC., NELSON BAGEL BAKERY, INC., NEPTUNE BRIGHTON BAGELS, INC., RUBINSTEIN BAGELS, INC., RUBINSTEIN BAGELS, INC., TRIBORO BAGEL CO. INC., D & H BAGEL BAKERY, INC., and POP'S BAGEL BAKERY, INC.,

Petitioners,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONERS' APPENDIX

JAN 26 1977
SECOND CIRCUIT

MYRON W. SISKIN
Attorney for Petitioners
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BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER-MEMBERS

and Case No. 29-CA-887-1

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONERY
WORKERS INTERNATIONAL UNION OF AMERICA

BACKPAY SPECIFICATION AND NOTICE OF HEARING

The National Labor Relations Board, herein called the Board, having on February 19, 1969 issued its Decision and Order (174 NLRB No. 101), which adopted the findings, conclusions, and recommendations, of the Trial Examiner, with certain modifications, and required that Respondents, Bagel Bakers Council of Greater New York (herein called the Council) and its Employer-Members, Bagel Box, Inc., Bagel Town, Inc., Benson Bagel Bakery, Culver Bagel Bakery, Far Rockaway Bagel Bakery, Inc., Flatlands Bagel Bakery, Inc., Golden Bagel Corp., Island Park-Nassau Bagel Bakery, Laurelton Bagel Bakery, Nelson Bagel Bakery, Inc., Neptune Bagel Bakers, Inc., 1/ Rubinstein Bagels, Inc., Joseph Rubinstein, Morris Rubinstein, and Herman Reiter, copartners doing business as Rubinstein Bagels, Tri-Boro Bagel Co. Inc., Pops Bagel Bakery, Inc., and D & H Bagel Bakery, 2/ their respective officers, agents, successors, and assigns (herein sometimes collectively referred to as Council Members), take the

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1/ In April, 1967, Neptune-Brighton Bagels, Inc. succeeded to the business of Neptune Bagel Bakers Inc. and became liable to remedy the unfair labor practices of its predecessor. As emumerated in the Appendices, the backpay alleged to be due to "Neptune" represents the backpay due jointly and severally from Neptune Bagel Bakers, Inc. and Neptune-Brighton Bagels Inc.

2/ It having been found by the Trial Examiner that D & H Bagel Bakery merged into Pops Bagel Bakery, Inc., with Pops as the surviving enterprise, Pops is liable to pay the backpay herein allocated to D & H.

action set forth in the Trial Examiner's Recommended Order, as modified; and

The United States Court of Appeals for the Second Circuit having on February 25, 1971 entered its Amended Judgment enforcing in pertinent part the Order of the Board in Case No. 29-CA-887-1 and, specifically, the reinstatement and backpay provision thereof; and

The United States Supreme Court having denied Respondents' petition for writ of certiorari on April 19, 1971; and

Controversy having arisen over the amount of backpay due under the Order, the Regional Director of the National Labor Relations Board for Region 29, pursuant to authority duly conferred upon him by the Board and the Rules and Regulations of the Board, Series 8, as amended, Section 102.52 hereby issues this Backpay Specification and Notice of Hearing and alleges that the backpay due is as follows:

I. THE BACKPAY PERIOD

1. The backpay period runs from February 1, 1967, date of the lockout, to October 1, 1968 when a new collective bargaining agreement between the respondents and the union became effective.

2. The backpay liability of certain of the Respondents is terminated prior to October 1, 1968, in the following cases, for the reasons stated below:

(a) Flatlands Bagel Bakery, Inc., - Liability terminates on June 15, 1967 pursuant to Decision of the Trial Examiner, footnote 14.

(b) Culver Bagel Bakery - Liability terminates on June 21, 1967, pursuant to Decision and Order of the Board, footnote 1.

(c) In the Appendices attached hereto and made a part hereof, the backpay claims allocated to each of the two above-named respondents have been adjusted (i.e., reduced) on a pro rata basis in accordance with the early termination dates stated above.

1. In most instances, the discriminatees involved in this proceeding regularly and customarily earned their annual incomes by virtue of employment by both Council Members and non-council members. As is reflected in the Appendices, the majority of employees involved in this proceeding, in accordance with the custom and practice of the industry were employed in many different shops during the base period and during the backpay period. Many worked for several different employers during the same week or month, having been sent out by the Union's referral system. They worked both for employers who were members of the Council and employers who were not Council members. 3/

2. An appropriate measure of the gross backpay which the discriminatees would have earned, per annum or fraction thereof, in the course of their employment in the bagel baking industry during the backpay period, absent the discrimination against them, is the total amount of their earnings in the bagel baking industry during the calendar year 1966, from both Council Members and non-Council Members.

3. An appropriate method for allocating the loss in wages suffered by an individual discriminatee during the backpay period, is (a) to allocate such total annual loss to those Council Members who employed the particular discriminatee during the base period (calendar year 1966); (b) to allocate shares of the total annual loss during the backpay period on a pro rata basis among the Council Members who employed the discriminatee during the base period in accordance with the proportion which each such Council Member's wage payment during the base period bears to the total of all such Council Members' payments to the individual discriminatee during the base period, but not in an amount which exceeds the total wages paid to the individual discriminatee during the base period by the particular Council Member.

3/ In some instances, discriminatees earned all or almost all of their annual income in the base period, 1966, by virtue of employment only by Council Members.

Interim earnings which it is admitted were earned by the claimants are set forth in the Appendices.

IV. NET BACKPAY

Net backpay is gross backpay less interim earnings, as set forth in the Appendices.

V. SUMMARY

Summarizing the facts and computations set forth above and in the Appendices, the obligations of the several Respondents to make whole the backpay claimants, will be discharged by payment by the Respondents named below to the claimants named below of the amounts set opposite their names, plus interest accrued to the date of such payment, less the tax withholdings required by Federal and State law:

(1) Bagel Box, Inc.

Joseph Martinosky	$1391	
Geraldo F. Russo	279	
		$1670

(2) Bagel Town, Inc.

Marvin Blind	$ 243	
Lawrence Horowitz	12,265	
Seymour Ostrofsky	492	
Saul Sapadin	53	
Jack Sugarman	3293	
		$16,346

(3) Benson Bagel Bakery

Ber Barth	$ 542	
William Brier	33	
Murray Fertel	773	
Samuel Provder	1661	
Joseph Silverman	3782	
Jack Todaro	157	
		$6948

(4) Culver Bagel Bakery

Julius Brooks	$ 252	
Murray Fertel	203	
Rachmil Lederstein	177	
Leon Spanier	497	
Jack Todaro	934	
		$2063

Samuel Cutler	$12,696	
Edward Haimowitz	869	
Leon Lifshutz	5002	
Seymour Ostrofsky	209	
David Siegel	3709	
Jack Sugarman	658	
		$23,143

(6) Flatlands Bagel Bakery Inc.

Murray Fertel	$ 24	
Morris Minto	1525	
Abraham Zaffos	622	
		$2171

(7) Golden Bagel Corp.

Abraham Baron	$1240	
Ber Barth	992	
William Brier	273	
Julius Brooks	201	
Murray Fertel	164	
Rachmil Lederstein	47	
Irving Levy	6443	
Arnold Newkofsky	9445	
Morris Schechter	7820	
Leon Spanier	4248	
Jack Todaro	79	
		$30,952

(8) Island Park-Nassau Bagel Bakery

Marvin Blind	$ 2233	
Jack Ostrofsky	18,638	
Ronald Ostrofsky	4629	
Jack Sugarman	512	
		$26,012

(9) Laurelton Bagel Bakery

Ber Barth	$ 450	
Marvin Blind	271	
Murray Boykin	1056	
William Brier	17	
Leon Lifshutz	1042	
Albert Rothstein	9409	
Saul Sapadin	354	
Walter Schuettig	8451	
David Siegel	649	
		$21,699

Isak Jakubowicz	$22	
		$22

(11) Neptune Bagel Bakers Inc. and Neptune-Brighton Bagels, Inc., jointly and severally

Ber Barth	$2784	
William Brier	66	
Murray Fertel	810	
Joseph G. Fleischman	2795	
Israel Goldenberg	2155	
Julius Ostrofsky	183	
Seymour Ostrofsky	109	
Jack Todaro	79	
		$8981

(12) Rubinstein Bagel Inc. and Joseph Rubinstein, Morris Rubinstein, and Herman Reiter, d/b/a Rubinstein Bagels

Ber Barth	$ 104	
Julius Brooks	27	
Murray Fertel	95	
Joseph G. Fleischman	100	
Isak Jakubowicz	818	
Lionel Stone	5347	
Hyman Ustin	668	
		$7159

(13) Tri-Boro Bagel Co. Inc.

Abraham Baron	$ 310	
Marvin Blind	2397	
Ralph Brier	5352	
Murray Fertel	118	
Joseph G. Fleischman	266	
James Goodrich	226	
Edward Haimowitz	6437	
Sheldon Hepner	1344	
Julius Ostrofsky	8710	
Seymour Ostrofsky	76	
Saul Sapadin	354	
David Siegel	139	
Emanuel Strugatch	1715	
Jack Sugarman	2048	
Jack Todaro	1217	
Israel Weiner	1531	
		$32,240

Marvin Blind	198	
Murray Boykin	288	
James Goodrich	10,847	
Edward Haimowitz	1391	
Seymour Ostrofsky	85	
Saul Sapadin	106	
David Seigel	93	
Stanley Siegel	6135	
Jack Sugarman	732	
		$20,045

(15) Pops Bagel Bakery, Inc. as successor to D & H Bagel Bakery

Murray Boykin	$8159	
Murray Fertel	76	
Eugene Moore	1992	
Seymour Ostrofsky	295	
Samuel Provder	2710	
Emanuel Strugatch	1143	
Markus Weisz	2373	
		$16,748

PLEASE TAKE NOTICE THAT on the 13th day of July, 1976 at 10:00 a.m., at 16 Court Street, Brooklyn, New York, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in this Backpay Specification at which time and place you will have the right to appear in person or otherwise, and give testimony.

You are further notified that, pursuant to Section 102.54 of the Board's Rules and Regulations, the Respondents shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Specification within fifteen (15) days from the service hereof, and that, to the extent they do not do so, the allegations in the said Specification shall be deemed to be admitted by said Respondents to be true and may be so found by the Board.

Dated at Brooklyn, New York this 24th day of June, 1976.

Samuel M Kaynard
Samuel M Kaynard

Samuel M. Kaynard
Regional Director
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, New York 11241

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER-MEMBERS

-and- Case No. 29-CA-887-1

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONERY
WORKERS INTERNATIONAL UNION OF AMERICA

ANSWER TO BACKPAY SPECIFICATION

OSCAR STERN, by his attorneys, STANLEY BRYER and FRIEDLANDER, GAINES, COHEN, ROSENTHAL & ROSENBERG, answers the Backpay Specification issued in the instant matter as follows:

1. Denies each and every allegation contained in paragraph V §(11) of the Backpay Specification pertaining to a defunct corporation formerly known as Neptune Bagel Bakers, Inc.

2. Denies knowledge and information sufficient to form a belief as to those matters contained in paragraphs I, II, III, IV, and each and every allegation contained in paragraph V, which is not denied above.

I

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

By Contract of Sale dated April 20, 1967 and by Bill of Sale dated April 26, 1967, Neptune Bagel Bakers, Inc., a New York corporation, by its President Oscar Stern, sold its equipment, premises, customer list and entire business to Neptune-Brighton Bagels, Inc., whose then principals were Donald Chakofsky and Robert Krublit.

II

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

At no time since April 1967 has Neptune Bagel Bakers, Inc. or Oscar Stern, its former President, engaged in its former business at 371 Neptune Avenue, Brooklyn, New York, or anywhere else.

III

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Since in or around April 1967, Neptune Bagel Bakers, Inc., formerly a New York corporation, has not transacted business of any kind and is totally defunct. Since the same time, Mr. Oscar Stern has no longer been an officer, agent or representative of Neptune Bagel Bakers, Inc., and has been retired for many years.

WHEREFORE, no determination should issue against the defunct corporation, Neptune Bagel Bakers, Inc.

Dated: New York, New York
June 30, 1976

Yours, etc.

STANLEY BRYER, ESQ.
Office & P.O. Address
Suite 1800
200 East 42nd Street
New York, New York
(212) MU-2-0790

FRIEDLANDER, GAINES, COHEN,
ROSENTHAL & ROSENBERG

By: David Kramer
David Kramer
Office & P.O. Address
1140 Avenue of the Americas
New York, New York 10036
(212) 575-9100

Attorneys for Mr. Oscar Stern
Former President of Neptune
Bagel Bakers, Inc.,
Now Defunct.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER-MEMBERS

-and- Case No. 29-CA-887-1

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONERY
WORKERS INTERNATIONAL UNION OF AMERICA

NOTICE OF MOTION

COMES NOW, Mr. Oscar Stern, by his attorneys STANLEY BRYER and FRIEDLANDER, GAINES, COHEN, ROSENTHAL & ROSENBERG, and advises that on the return date of the Backpay Specification and Notice of Hearing in the above-entitled matter, now set for the 13th day of July, 1976 at 10:00 A.M., at 16 Court Street, Brooklyn, New York, a motion will be made before the Administrative Law Judge to delete Neptune Bagel Bakers, Inc. as a Respondent on the following grounds:

1. That Neptune Bagel Bakers, Inc. has not been engaged in business of any kind since in or about April 1967 and has, since approximately that time, been defunct and no longer exists as a corporation under the laws of the State of New York; and

2. Mr. Oscar Stern, formerly the President of the now defunct corporation, Neptune Bagel Bakers, Inc., has not engaged in any business involving said defunct corporation since in or about April 1967 and has, for many years, been retired from business.

Dated: New York, New York
June 30, 1976

Yours, etc.

STANLEY BRYER, ESQ.
Office & P.O. Address
Suite 1800
200 East 42nd Street
New York, New York 10017
(212) MU-2-0790

FRIEDLANDER, GAINES, COHEN,
ROSENTHAL & ROSENBERG

By: David Kramer
David Kramer
Office & P.O. Address
1140 Avenue of the Americas
New York, New York 10036
(212) 575-9100

Attorneys for Mr. Oscar Stern
Former President of Neptune
Bagel Bakers, Inc.,
Now Defunct.

CERTIFICATE OF MAILING

The undersigned hereby certifies that copies of the within Answer to Backpay Specification and Notice of Motion have been served upon the parties to the proceeding listed below.

Dated: New York, New York
June 30, 1976

David Kramer
David Kramer

Bagel Bakers Council of
Greater New York
16 Court St.
Brooklyn, N.Y.
Att: Philip Levine, Esq.

Bagel Town, Inc.
3527 Hempstead Tpke.
Levittown, N.Y. 11552

Culver Bagel Bakery
483 McDonald Avenue
Brooklyn, N.Y. 11218

Flatlands Bagel Bakery, Inc.
8101 Flatlands Avenue
Brooklyn, N.Y. 11236

Island Park-Nassau Bagel Bakery
2941 Long Beach Rd.
Oceanside, N.Y.

Nelson Bagel Bakery, Inc.
3405 Jerome Avenue
Bronx, New York

Bagel Box, Inc.
85-30 37th Avenue
Jackson Heights, N.Y. 11372

Benson Bagel Bakery
6522 17th Avenue
Brooklyn, New York 11204

Far Rockaway Bagel Bakery, Inc.
526 Beach 20th St.
Far Rockaway, N.Y. 11691

Golden Bagel Corp.
533 Kings Highway
Brooklyn, N.Y. 11230

Laurelton Bagel Bakery
224-17 Merrick Rd.
Laurelton, N.Y. 11413

Rubinstein Bagel, Inc.
711 Lydig Avenue
Bronx, New York 10462

.../

Neptune-Brighton Bagels, Inc.
371 Neptune Avenue
Brooklyn, N.Y. 11235

Triboro Bagel Co., Inc.
183-12 Horace Harding Exp.
Freah Meadows, New York 11366

D & H Bagel Bakery
1352 Peninsula Blvd.
Hewlett, N.Y. 11550

Cohn, Glickstein, Lurie, and Ostrin
1370 Avenue of the Americas
New York, New York
Att: Jerome Lurie

Joseph Rubinstein, Morris
Rubinstein and Herman
Reiter d/b/a Rubinstein
Bagels
711 Lydig Avenue
Bronx, N.Y. 10462

Pops Bagel Bakery, Inc.
1352 Peninsula Blvd.
Hewlett, N.Y. 11550

Bakery & Confectionery
Workers
International Union of
America, Local No. 3,
Bagel Division
41-07 Crescent St.
Long Island City, N.Y. 11101

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER MEMBERS

-and-

Case No. 29-CA-887-1

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONARY
WORKERS INTERNATIONAL UNION OF AMERICA

ANSWER TO BACKPAY SPECIFICATION

The BAGEL BAKERS COUNCIL OFGREATER NEW YORK AND ITS EMPLOYER MEMBERS ,by its attorney, MYRON W. SISKIN,answers the Backpay Specification issued in the within matter as follows:

1. Denies each and every allegation contained in paragraphs I, II, IV and V.

2. Denies knowledge and information sufficient to form a belief as to those matters contained in Paragraph III of the Backpay Specification,except admits that the employer members are entitled to/use as credits the sums earned by the claimants,and that the amounts credited to the employer members were grossly understated,and that a correct computation would result in zero backpay specifications for the employer members.

I
AS AND FOR A FIRST AFFIRMATIVE DEFENSE

1. The computation of the backpay specification was erroneous and grossly excessive in that it failed to take into account and utilize the fact that there was an industry wide downward condition which necessarily would have curtailed the use of the pertinent labor by at least 90% from the base period,during the period the back pay was computed. When such factor receives its proper recognition in the backpay computation, no backpay amount is due the claimants.

II
AS AND FOR A SECOND AFFIRMATIVE DEFENSE

2. The computation of the backpay specification was erroneous and grossly excessive in that it failed to take into account and utilize the fact that pursuant to the union contract the earnings of the claimants during any back pay period must necessarily have been sharply curtailed and in all events, less than $113.00 per week as a maximum, and said computation was further grossly excessive in that all the claimants projected earnings must necessarily have been far less than the figures arrived at.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

III

3. The computation of the backpay specification was erroneous and grossly excessive in that it failed to use as a norm and gauge and weighted factor, the fact that the salaries of the claimants-employees for the backpay period would be most appropriately and properly andaccurately computed by use of sales of bagels, flour purchases, instead of prior earnings, during the back pay period. Use of the proper norms would result in no backpay award.

IV

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

4. The computation of the backpay specification was erroneous and grossly excessive in that it utilized an inappropriate norm and guage in computing back pay, prior earnings. Use of the appropriate normsand factors would result in no back pay specifications.

V.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

5. The computation of the backpay specification was erroneous and grossly excessive in that it failed to recognize and take into account the fact that the employers would not have been able to rehire the employees irrespective of any initial discrimination claimed or found by the Board, as there was a bona-fide reduction and contraction in the volume of bagel business during the backpay period, due to factors beyond the control of the employers. Taking into account the said reduction and contraction during the back pay period utilized would result in no award at all to the employees for backpay.

VI

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

6. The computation of the backpay specification was erroneous and grossly excessive in that it failed to take into account and utilize the fact that there weretechnological advances and improvements in the field during the back pay period utilized by the Board which sharply and severely curtailed the use of hand labor in the subject employers. Giving proper weight to this factor would result in no back pay specification.

VII

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

7. The computation of the backpay specification was erroneous and grossly excessive in that it failed to take into account the fact that there was an industry wide deterioration of business conditions during the back pay period used by the Board,as contrasted with the base period and base period earnings used by the Board,which necessarily must have resulted in sharply lower employment during the back pay period of the claimants used by the Board.Taking into account the said deterioration would result in a back pay specification of a maximum of ten(10%) per cent of the amount arrived at by the Board.

VIII

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

8. The computation of the backpay specification was erroneous and grossly excessive in that it failed to include as a major,pivotal and crucial factor,the fact that there had been an enormous increase in competition during the back pay period used by the Board,and an enormous increase in the share of the total bagel market taken up by the machine bagel shops and the non union shops during the back pay period. Taking into account in proper manner these factors would result in a zero specification for back pay.

IX

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

9. The computation of the backpay specification was erroneous and grossly excessive in that it failed to take into proper account and perspective the fact that during the back pay period alleged by the Board,the employer-members operated at a material and substantial loss in financial operations.Taking into proper account this factor would result in zero back pay specifications.

X

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

10. The computation of the backpay specification was erroneous and grossly excessive in that it failed to take into proper account and perspective the fact that during the backpay period utilized by the Board the employer-members were severely overtaxed with debt and obligations,substantially greater than the base period used by the Board,and could not have paid the payroll amounts computed by the Board during the backpay period used by the Board.Taking into proper weight and perspective this factor would result in zero backpay specifications.

XI

AS ANDFOR AN ELEVENTH AFFIRMATIVE DEFENSE

11. The computation of the backpay specification was erroneous and grossly excessive inthat it failed to take into account the fact that the employer-members had lost the wholesale business during the backpay period.Accordingly,taking into proper account this fact would result in zero specification of back pay.

XII

AS ANDFOR A TWELFTH AFFIRMATIVE DEFENSE

12. The computation of the backpay specification was erroneous and grossly excessive in that it utilized an erroneous back pay period.The furthest date to which such period could terminate would be February 3, 1968,and not the date used by the Board,Sept.30,1968.Using the proper backpay period would result

in a zero backpay specification.

XIII
AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

13. The computation of the back pay specification was erroneous and totally excessive in that it failed to utilize the best evidence and documentation available to it-the books and records and tax returns of the employer-members, during the period and covering the period, of back pay utilized by the Board. Use of such documentation would result in a zero back pay specification.

XIV
AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

14. The computation of the backpay specification was erroneous and totally excessive in that it failed to utilize the fact that the employer-members would have been required to cease operations completely, if the employment had been as projected by the backpay, as the extent and magnitude of the losses would have precluded further operations prior to the full running of the back pay period utilized. Taking into account this factor would result in zero back pay specifications.

XV
AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

15. The computation of the backpay specification was erroneous and grossly excessive in that it failed to utilize the fact that the employer members had limited working capital during the backpay period used by the Board, and were not in a position to raise additional working capital, so that the employers were not in a position to pay the amounts projected as being earned by the claimants. Taking into account this factor would mean that there would be a zero back pay specification.

XVI
AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

16. The computation of the backpay projected earnings was erroneous and grossly excessive in that it failed to take into account and give proper weight the fact that the employees did

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not desire reemployment and/or reinstatement by the employers during the backpay period, as earnings could not have been to the level of the prior year and years, or anything close to same. Taking into account this factor would have mean a sharply reduced payroll to the claimants during the back pay period, and would result in a zero back pay specification.

XVII

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

17. The computation of the back pay specifications was erroneous and grossly excessive in that it failed to recognize and give proper weight the fact that there were no available jobs for the employees involved during the back pay period alleged. Taking into account this factor would result in zero back pay specifications.

XVIII

AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

18. The computation of the backpay specification was erroneous and grossly excessive, in that it failed to recognize and take into account the fact that the employees involved did not make themselves available for work during the back pay period alleged by the Board. Taking this factor into account would result in a zero backpay specification.

XIX

AS AND FOR A NINETEENTH AFFIRMATIVE DEFENSE

19. The computation of the backpay specification was erroneous and grossly excessive in that the union practices of selective referral would necessarily have resulted in non-hiring and no overtime of the employees involved during the back pay period alleged, and in any event would not have resulted in earnings greater than 10% of the amount projected in the Back pay specification during the back pay period alleged. Taking into account this factor would result in a zero back pay specification.

XX

AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE

20. The back pay computation was erroneous and grossly

excessive in that in computing said back pay specification the Board failed to take into account Judge George Rosling's order which ordered first right of hiring to those with seniority. Taking into account this factor would result in zero back pay specification.

XXI

AS AND FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

21. The computation of the back pay specification was erroneous and grossly excessive in that it failed to recognize and take into account the fact that the employees involved did not desire the reemployment and/or reinstatement by the employers envisaged by the back pay specification.

XXII

AS ANDFOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

22. The computation of the back pay period was erroneous andgrossly excessive in that it failed to recognize and take into accont the fact of attrition among the employees due to time and other factors,including factors of lost volume by the employers,and reduced earning capacity to the employees involved.

XXIII

AS AND FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE

23. The computation of the back pay specification was erroneous and grossly excessive,in that it failed to recognize that the employer-members were entitled to far greater credits than were utilized by the Board in arriving at credits due the employer in computing back pay specification. The employers were entitled to credits for other income and benefits received by the claimants which were not reflected in the computation by the Board.Taking into account this factor would result in zero specifications.

XXIV

AS AND FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. The computation of the back pay amount was grossly excessive in that it failed to recognize and subtract self-employment status and earnings on the part of several of the employees.Taking into account this factor would result in sharply reduced amounts, not greater than 20% of the amount arrived at.

XXV

AS AND FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. The computation of the Backpay specification was grossly overstated as the formula utilized was totally inapposite and incorrect in assumption and theory.Using the correct formula would result in zero specifications.

XXVI

AS AND FOR A TWENTY-SIXTH AFFIRMATIVE DEFENSE

26. The computation ofthe Backpay specification was grossly overstated as the employees involved refused to do part time employmentas distinguised from their former work load,so that taking into account this factor during the pay period used in the back pay specification would result in sharply reduced back pay specifications. Taking into accountthis factor would mean that the correct back pay specifications could not be more than 10% of the amount arrived at.

XXVII

AS AND FOR A TWENTY_SEVENTH AFFIRMATIVE DEFENSE

27. The computation of the back pay specification was grossly overstated in that it failed to utilize procedures and data properly applicable to the bagel industry in its computation of the back pay specifications.The utilization of such data and norms would result in zero specifications.

XXVIII

AS AND FOR A TWENTY-EIGHTH AFFIRMATIVE DEFENSE

28. The computation of the back pay specification was incorrect and grossly overstated and in error as same failed to take into account that the employees involved waived their rights to a back pay award by virtue of their employment status during the back pay period utilized.By virtue of such employment status and their non availability for work,said employees could not properly receive an award herein. Taking into account this factor would result in zero back pay specifications.

XXIX

AS ANDFORA TWENTY-NINTH AFFIRMATIVE DEFENSE

29.The computation of the back pay specification was totally in error and grossly overstated as the employees involved waived their rights to back pay by refusing employment during the back pay period used,said offers being properly and equitably made by the employers.Taking into account this waiver,there is no back pay specification possible.

XXX

AS AND FOR A THIRTIETH AFFIRMATIVE DEFENSE

30. The employees involved are estopped to assert damages for back pay,based upon their refusal to work for the employers during the back pay period utilized by the board. Based upon such estoppel,there would be no back pay specifications possible.

XXXI

AS AND FOR A THIRTY-FIRST AFFIRMATIVE DEFENSE

31. The computation ofthe back pay specification was incorrect and totally excesive in that it was arithmetically incorrect,since the assumptions inherent in the formulation thereof were incorrect.Taking into account such error would mean zero specifications.

XXXII

AS AND FOR A THIRTY-SECOND AFFIRMATIVE DEFENSE

32. The computation of the back pay specification was grossly overstated in that it failed to recognize that the back pay computation was incorrect because of a failure by the employees to diligently attempt to obtain employment.

XXXIII

AS AND FOR A THIRTY-THIRD AFFIRMATIVE DEFENSE

33. The computation of the back pay specification was grossly overstated because it failed to recognize as a major factor during the back pay period the fact that labor saving devices would have reduced the employment of the employees involved,over 90% during the back pay period used.

XXXIV

AS AND FOR A THIRTY-FOURTH AFFIRMATIVE DEFENSE

34. The computation of the backpay specification was erroneous and grossly excessive in that the Board failed to recognize and take into account the unemployment and other benefits available to the employees involved which would have severely reduced the back pay specifications.

XXXV

AS AND FOR A THIRTY-FIFTH AFFIRMATIVE DEFENSE

35. The computation of the backpay specification was erroneous and grossly excessive in that the backpay period upon which it was necessarily based was totally in error and grossly excessive.

XXXVI

AS AND FOR A THIRTY-SIXTH AFFIRMATIVE DEFENSE

36. The computation of the backpay period was erroneous and grossly excessive as said computation was based on erroneous assumptions not proper for the computation made and arrived at. When correctly computed no backpay amount is due the claimants.

XXXVII

AS AND FOR A THIRTY-SEVENTH AFFIRMATIVE DEFENSE

37. The computaton of the backpay period was erroneous and grossly excessive as the period arrived at failed to take into account the fact that the furthest date to which a lockout could have been applicable was February 3, 1967, thus drastically reducing the backpay period.

XXXVIII

AS AND FOR A THIRTY-EIGTH AFFIRMATIVE DEFENSE

38. The computation of the back pay period was erroneous and grossly excessive as the liability of the employers terminated as a matter of law and fact prior to the date utilized by the Board, and in no event later than February 3, 1968, thus drastically reducing the backpay period.

XXXIX

AS AND FOR A THIRTY-NINTH AFFIRMATIVE DEFENSE

39. The computation of the Backpay period is erroneous and grossly excessive in that it failed to recognize and take into account the fact that the employers would not have been able to rehire the employees irrespective of any initial discrimination claimed or found by the Board, as there was a bona-fide reduction and contraction in the volume of the bagel business during the back pay period, due to factors beyond the control of the employers. Taking into account the said reduction and contraction during the back pay period utilized would result in a drastically reduced period of back pay.

XXXX

AS AND FOR A FOURTIETH AFFIRMATIVE DEFENSE

40. The computaton of the backpay period is erroneous and grossly excessive in that it failed to recognize and take into account the fact that there were technological advances and improvements in the bagel baking industry during the back pay period used by the Board which drastically curtailed the use of hand labor and manpower in the subject employers. Giving proper weight to this factor would result in a drastically reduced back pay period.

XXXXI

AS AND FOR A FORTY-FIRST AFFIRMATIVE DEFENSE

41. The computation of the backpay period was erroneous and grossly excessive in that it failed to take into account and recognize the fact that there was an industry wide deterioration of business conditions during the back pay period used by the Board, which necessarily must have resulted in severely curtailed employmentduring the back pay period and which thereby reduced such period.

XXXXII

AS AND FOR A FORTY-SECOND AFFIRMATIVE DEFENSE

42. The computation of the back pay period was erroneous and grossly excessive in that it failed to include as a major pivotal and crucial factor, the fact that there had been an enormous increase in competition during the back pay period used by the Board, and an enormous increase in the share of the total bagel market taken up by the machine bagel shops and non union shops during the back pay period which properly taken into account would have sharply

such period.

XXXXIII

AS AND FOR A FORTY-THIRD AFFIRMATIVE DEFENSE

43. The computation of the back pay period was erroneous and grossly excessive in that it failed to take into proper account and perspective the fact that during the back pay period alleged by the Board, the employer members operated at a material and substantial loss, which would necessarily have curtailed employment during such period and which thereby reduced the back pay period.

XXXXIV

AS AND FOR A FORTY-FOURTH AFFIRMATIVE DEFENSE

44. The computation of the back pay period was erroneous and grossly excessive in that it failed to recognize and take into account the fact that during the back pay period used by the Board the employer members were severely overtaxed with debt and obligations, and could not have paid the payroll amounts computed by the Board during the back pay period used by the Board, and thus employment would have been severely reduced which thereby reduced the back pay period.

XXXXV

AS AND FOR A FORTY-FIFTH AFFIRMATIVE DEFENSE

45. The computation of the back pay period was erroneous and grossly excessive in that it failed to take into account and recognize the fact that the employer-members had lost the wholesale business during the back pay period. Accordingly, taking into proper account this fact would result in a sharply reduced back pay period.

XXXXVI

AS AND FOR A FORTY-SIXTH AFFIRMATIVE DEFENSE

46. The computation of the back pay period was erroneous and grossly excessive in that it failed to take into account and recognize the fact that the employer-members would have been required to cease operations completely, if the employment had been as projected by the back pay specifications, as the extent and magnitude of the losses would have precluded further operations prior to the full running of the back pay period utilized.

XXXXVII

AS AND FOR A FORTY-SEVENTH AFFIRMATIVE DEFENSE

47. The computation of the back pay period was erroneous and grossly excessive in that it failed to utilize and take into account the fact that the employer-members had limited working capital during the back pay period used by the Board, and were not in a position to raise additional working capital, so that the employers were not in a position to pay the amounts projected as being earned by the claimants. Taking into account this factor would mean there would be a drastically reduced back pay period.

XXXXVIII

AS AND FOR A FORTY-EIGTH AFFIRMATIVE DEFENSE

48. The computation of the backpay projected earnings was erroneous and grossly excessive in that it failed to take into account and give proper weight the fact that the employees did not desire reemployment and/or reinstatement by the employers during the backpay period, as earnings could not have been to the level of the prior years, or anything close to same. Taking this into account would have severely reduced the back pay period.

IL

AS AND FOR A FORTY-NINTH AFFIRMATIVE DEFENSE

49. The computation of the back pay period was erroneous and grossly excessive in that it failed to recognize and take into account the fact that there were no jobs available for the claimants during the back pay period alleged. Taking this factor into account would have severely reduced the back pay period.

L

AS AND FOR A FIFTIETH AFFIRMATIVE DEFENSE

50. The computation of the back pay period was erroneous and grossly excessive in that it failed to recognize and take into account the fact that the employees did not make themselves available for work during the back pay period alleged. Taking this factor into account would have severely reduced the back pay period.

LI

AS AND FOR A FIFTY-FIRST AFFIRMATIVE DEFENSE

51. The computation of the back pay period was erroneous and

grossly excessive in that it failed to utilize procedures and data properly applicable to the bagel industry in its computation of the back pay period. The utilization of proper data and norms would result in a severely reduced back pay period.

WHEREFORE, no determination should issue against the Bagel Bakers Council Of Greater New York And Its Employer Members.

Dated: July 14, 1976
New York, New York

Yours, etc.
Myron W. Siskin
Office & P.O. Address
Suite 626
855 Avenue of the Americas
New York. New York
(212) 683-1658
By: ______________________

Attorney For Bagel Bakers Council
of Greater New York And its
Employer Members.

BEST COPY AVAILABLE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER MEMBERS

-and-

Case No.29-CA-887-1

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONARY
WORKERS INTERNATIONAL UNION OF AMERICA

NOTICE OF MOTION

COMES NOW, NEPTUNE -BRIGHTON BAGELS, INC., by its attorney, MYRON W. SISKIN and advises that on the return day of the Backpay Specification and Notice of Hearing in the above entitled matter, now set for the 19th day of July 1976, at 10:00 A.M. at 16 Court Street, Brooklyn, New York, a motion will be made before the Administrative Law Judge to delete NEPTUNE -BRIGHTON BAGELS, INC. as a Respondent on the following grounds:

1. That Neptune-Brighton Bagels, Inc. did not succeed to the business of Neptune Bagel Bakers, Inc. either by merger or otherwise, and did not assume any obligation for unfair labor practices alleged of NEPTUNE BAGEL BAKERS, INC.
2. That NEPTUNE-BRIGHTON BAGELS, INC. is not a proper party in this proceeding.

Dated: July 14, 1976

Yours, etc.

MYRON W. SISKIN
Office and P.O. Address
Suite 626
855 Avenue of Americas
New York, New York 10001
212-683-1658

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER MEMBERS

-and-

Case No.29-CA-887-1

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONARY
WORKERS INTERNATIONAL UNION OF AMERICA

NOTICE OF MOTION

COMES NOW, POPS BAGEL BAKERY,INC. by its attorney,MYRON W. SISKIN,and advises that on the return day of the Backpay Specification and Notice of Hearing in the above entitled matter, now set for the 19th day of July 1976,at 10:00 A.M. at 16 Court Street,Brooklyn, New York a motion will be made before the Administrative Law Judge to delete POPS BAGEL BAKERY,INC. as a Respondent on the following grounds:

1. That POPS BAGEL BAKERY,INC. did not merge with D&H Bagel Bakery,, as stated in the Backpay Specification and Pops Bagel Bakery,Inc. is not liable to pay the backpay allocated to D&H Bagel Bakery,as alleged and claimed in the Backpay specification.

2. No merger,statutory or otherwise took place between POPS BAGEL BAKERY,INC. and D&H BAGEL BAKERY, as alleged or claimed in the Backpay specification.

3. That POPS BAGEL BAKERY,INC. is not a proper party respondent,as to any liability of D&H BAGEL BAKERY.

Dated: July 14,1976

Yours,etc.

MYRON W. SISKIN
Office and P.O.Address
Suite 626
855 Avenue of Americas
New York,New York 10001
212-683-1658

AMENDMENT TO BACKPAY SPECIFICATION

In addition to the amounts heretofore alleged to be due to claimants from respondents, it is further alleged that an additional sum of money is due to each of the baker claimants to compensate him for loss of holiday and vacation benefits as follows:

1 - Pursuant to paragraph twentieth of the 1966-1967 Agreement between Respondents and Bagel Bakers Union Local 338, Respondents were obligated to make contributions into the Local 338 Vacation and Holiday Fund at the rate of 8 1/2 cents for each box of bagels produced.

2 - Such contributions were disbursed by the Fund in an equal amount of each full time baker in the industry in accordance with rules set forth in paragarphs Seventeenth and Eighteenth of the Agreement.

3 - Pursuant to such rules, the Vacation and Holiday Fund distributed to each baker claimant the following vacation and holiday payments:

1966 - $1239.76
1967 - 224.44
1968 -0-

4 - Absent the discrimination against them baker claimants would have received from the Vacation and Holiday Fund the following payments:

1967 - $1239.76
1968 - 929.82 (75% of 1966 payment).

5 - The additional net backpay in the form of Vacation and Holiday benefits due to baker claimants is as follows:

	1967	1968
Amount Due	$1239.76	$929.82
Amount Paid	224.44	-0-
Net Balance Due	$1015.32	$929.82

6 - Payments by the Fund to kettlemen were as follows:

1966 - $590.06
1967 - 88.50
1968 -0-

7 - Absent the discrimination against them, kettlemen claimants would have received from the Vacation and Holiday Fund, the following payments:

1967 - $590.06
1968 - 442.55 (75% of 1966 payment)

8 - The additional net backpay in the form of Vacation and Holiday benefits due to kettlemen claimants is as follows:

	1967	1968
Amount Due	$590.06	$442.55
Amount Paid	88.50	-0-
Net Balance Due	$501.56	$442.55

9 - The net amounts found due above must be allocated to each respondent on a pro rata basis in accordance with pro rata allocations set forth in the claimants' respective "C" appendices.

COMPUTATION AND ALLOCATION OF EMPLOYERS' NET BACKPAY LIABILITY FOR VACATION AND HOLIDAY BENEFITS

APPENDIX 1-D - ABRAHAM BARON - BAKER

COMPANY	%	1967 GROSS LOSS-$1015.32	1968 GROSS LOSS-$929.82	TOTAL
Golden	12	121.83	111.57	$233.40
Tri Boro	3	30.45	27.89	58.34
TOTAL				$291.74

APPENDIX 2-D - BER BARTH - BAKER

Golden	19.2	194.94	178.52	$ 373.46
Neptune	53.7	545.22	499.31	1044.53
Pops	3.3	33.50	30.68	64.18
Benson	10.5	106.60	97.63	204.23
Laurelton	8.7	88.33	80.89	169.22
Rubinstein	2.0	20.30	18.59	38.89
TOTAL				$ 1894.51

APPENDIX 3-D - MARVIN BLIND - BAKER

Tri Boro	42.4	430.49	394.24	$ 824.73
Island Park	39.5	401.05	367.27	768.32
Laurelton	4.8	48.73	44.63	93.36
Bageltown	4.3	43.65	39.98	83.63
Pops	3.5	35.53	32.54	68.07
TOTAL				$ 1838.11

APPENDIX 4-D - MURRAY BOYKIN - BAKER

D & H	85	863.02	790.34	$ 1653.36
Laurelton	11	111.68	102.28	213.96
Pops	3	30.45	27.89	58.34
TOTAL				$ 1925.66

APPENDIX 5-D - RALPH BRIER - BAKER

Tri Boro	98	995.01	911.22	$ 1906.23
TOTAL				$ 1906.23

APPENDIX 6-D - WILLIAM BRIER - BAKER

COMPANY	%	1967 GROSS LOSS-$1015.32	1968 GROSS LOSS-$929.82	TOTAL
Golden	33	335.05	306.84	$641.89
Culver	27	106.91	-0-	106.91
Neptune	8	81.22	74.38	81.22
Benson	4	40.61	37.19	77.80
Laurelton	2	20.30	18.59	38.89
TOTAL				$1021.09

APPENDIX 7-D - JULIUS BROOKS - BAKER

Culver	80	316.77	-0-	$316.77
Golden	15	152.29	139.47	219.76
Rubeinstein	2	20.30	18.59	38.89
TOTAL				$647.42

APPENDIX 8-D - SAMUEL CUTLER - BAKER

Far Rockaway	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 9-D - MURRAY FERTEL - BAKER

Culver	33	130.66	-0-	$130.66
Neptune	25	253.82	232.45	486.27
Benson	24	243.67	223.15	466.82
Golden	5	50.76	46.49	97.25
Tri Boro	4	40.61	37.19	77.80
Flatlands	4	15.23	-0-	15.23
Rubinstein	4	40.61	37.19	77.80
D & H (Pops)	2	20.30	18.59	33.89
TOTAL				$1390.72

APPENDIX 10-D - JOSEPH C. FLEISCHMAN - BAKER

Neptune	84	852.86	781.04	$1633.90
Tri Boro	8	81.32	74.38	155.60
Rubinstein	3	30.45	27.89	58.34
TOTAL				$1847.84

APPENDIX 11-D - ISRAEL GOLDENBERG - BAKER

Neptune	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 12-D - JAMES GOODRICH - BAKER

COMPANY	%	1967 GROSS LOSS-$1015.32	1968 GROSS LOSS-$929.82	TOTAL
Pops	96	974.70	892.62	$1867.32
Tri Boro	2	20.30	18.59	38.89
TOTAL				$1906.21

APPENDIX 13-D - EDWARD HAIMOWITZ - BAKER

Tri Boro	74	751.33	688.06	$1439.39
Pops	16	162.45	148.77	311.22
Far Rockaway	10	101.53	92.98	194.51
TOTAL				$1945.12

APPENDIX 14-D - SHELDON HEPNER - KETTLEMAN

COMPANY	%	1967 GROSS LOSS-$501.56	1968 GROSS LOSS-$442.55	TOTAL
Tri Boro	96	481.49	424.84	$906.33
TOTAL				$906.33

APPENDIX 15-D - LAWRENCE HOROWITZ - BAKER

Bagel Town	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 16-D - ISAK JAKUBOWICZ - BAKER

Nelson Bagel	2.6	26.70	24.45	$ 51.15
Rubinstein	97.3	988.61	905.36	1893.97
TOTAL				$1945.48

APPENDIX 17-D - RACHMIL LEDERSTEIN - KETTLEMAN

Culver	90.65	180.49	-0-	$180.49
Golden	9.35	46.89	41.37	88.26
TOTAL				$268.75

APPENDIX 18D - IRVING LEVY - BAKER

Golden	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 19-D - LEON LIFSHUTZ - BAKER

COMPANY	%	1967 GROSS LOSS-$1015.32	1968 GROSS LOSS-$929.82	TOTAL
Far Rockaway	80.2	814.28	745.71	$1559.99
Laurelton	16.7	169.55	155.27	324.82
TOTAL				$1884.81

APPENDIX 20-D - JOSEPH MARTINOSKY - KETTLEMAN

COMPANY	%	1967 GROSS LOSS-$501.56	1968 GROSS LOSS-442.55	TOTAL
Bagel Box	100	501.56	-0-	$501.56
TOTAL				$501.56

APPENDIX 21-D - MORRIS MINTON - BAKER

Flatlands	39	396		396

APPENDIX 22-D - EUGENE MOORE - KETTLEMAN

Pops	100	501.56	442.55	$944.11
TOTAL				

APPENDIX 23-D - ARNOLD NEWKOFSKY - BAKER

Golden Bagel	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 24-D - JACK OSTROFSKY - BAKER

Island Park Nassau	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 25-D - JULIUS OSTROFSKY - BAKER - (Settled)

APPENDIX 26-D - RONALD OSTROFSKY - KETTLEMAN

COMPANY	%	1967 GROSS LOSS-$501.56	1968 GROSS LOSS-$442.55	TOTAL
Island Park	100	501.56	442.55	$944.11
Nassau				
TOTAL				$944.11

APPENDIX 27-D SEYMOUR OSTROFSKY - BAKER

COMPANY	%	1967 GROSS LOSS-$1015.32	1968 GROSS LOSS-$929.82	TOTAL
Bagel Town	39	395.97	362.62	$758.59
D & H	23	233.52	213.85	447.37
Far Rockaway	16	162.45	148.77	311.22
Neptune	9	91.37	83.68	175.05
Pops	7	71.07	65.08	136.15
Tri Boro	6	60.91	55.78	116.69
TOTAL				$1945.07

APPENDIX 28-D - SAMUEL PROVDER - BAKER

Benson	38	385.82	353.33	$ 739.15
D & H	62	629.49	576.48	1205.97
TOTAL				$1945.12

APPENDIX 29-D - ALBERT ROTHSTEIN - BAKER

Laurelton	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 30-D - GERARDO F. RUSSO - BAKER

Bagel Box	95	964.55	883.32	$1847.87
TOTAL				$1847.87

APPENDIX 31-D - SAUL SAPADIN - KETTLEMAN

Tri Boro	40	200.62	-0-	$200.62
Laurelton	40	200.62	-0-	200.62
Pops	12	60.18	-0-	60.18
Bagel Town	6	30.09	-0-	30.09
TOTAL				$491.49

APPENDIX 32-D - MORRIS SCHECHTER - BAKER

Golden	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 33-D - WALTER SCHUETTIG - KETTLEMAN

COMPANY	%	1967 GROSS LOSS-$501.56	1968 GROSS LOSS-$442.55	TOTAL
Laurelton	100	501.56	442.55	$944.11
TOTAL				$944.11

APPENDIX 34-D - DAVID SIEGEL - BAKER

COMPANY	%	1967 GROSS LOSS-$1015.32	1968 GROSS LOSS-$929.82	TOTAL
Far Rockaway	80	812.50	743.85	$1556.35
Laurelton	14	142.14	130.17	272.31
Tri Boro	3	30.45	27.82	58.27
Pops	2	20.30	18.59	38.89
TOTAL				$1925.82

APPENDIX 35-D - STANLEY SIEGEL - BAKER

Pops	98	995.01	911.22	$1906.23
TOTAL				$1906.23

APPENDIX 36-D - JOSEPH SILVERMAN - BAKER

Benson	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 37-D - LEON SPANIER - KETTLEMAN

Golden	65	326.01	287.65	$613.66
Culver	35	68.46	-0-	68.46
TOTAL				$682.12

APPENDIX 38-D - LIONEL STONE - BAKER

Rubinstein	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 39-D - EMANUEL STRUGATCH - BAKER

Tri Boro	60	609.19	557.89	$1167.08
D & H	40	406.12	371.92	778.04
TOTAL				$1945.12

APPENDIX 40-D - JACK SUGARMAN - BAKER

COMPANY	%	1967 GROSS LOSS-$1015.32	1968 GROSS LOSS-$929.82	TOTAL
Bagel Town	45	456.89	418.41	$875.30
Tri Boro	28	284.28	260.34	544.62
Far Rockaway	9	91.37	83.68	175.05
Pops	10	101.53	92.98	194.51
Island Park	7	71.07	65.08	136.15
Nassau				
TOTAL				$1925.63

APPENDIX 41-D - JACK TODARO - BAKER

Culver	61	241.54	-0-	$241.54
Tri Boro	31	314.74	283.24	602.98
Benson	4	40.61	37.19	77.80
Golden	2	20.30	18.59	38.89
Neptune	2	20.30	18.59	38.89
TOTAL				$1000.10

APPENDIX 42-D - HYMAN USTIN - BAKER

Rubinstein	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 43-D - ISRAEL WEINER - BAKER

Tri Boro	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 44-D - MARKUS WEISZ - BAKER

D & H	100	1015.32	929.82	$1945.14
TOTAL				$1945.14

APPENDIX 45-D ABRAHAM ZAFFOS - BAKER

Flatlands	39	396		396

BEST COPY AVAILABLE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER MEMBERS

-and-

Case # 29-CA-[illegible]

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONARY
WORKERS INTERNATIONAL UNION OF AMERICA

GC-1-O
8/4/76

NOTICE OF MOTION

COMES NOW, BAGEL BAKERS COUNCIL OF GREATER NEW YORK, AND ITS EMPLOYER MEMBERS, by their counsel, MYRON W. SISMAN, and advises that said respondents will move before the Administrative Law Judge to add the following affirmative defenses to the answer heretofore filed and served, which shall be in addition to the additional affirmative defenses heretofore added to the answer:

1. That the computation of the backpay specification was erroneous and grossly excessive in that it failed to take into account the seniority system in effect at the time, and failedto take into account the seniority system observance ordered by the District Court upon the Bagel Bakers Council and itsemployer members. Taking into account these factors would mean that there would be no backpay specifications resulting in back pay awards, or back pay awards not exceeding [illegible] of the amount computed.

2. That the computation of the backpay specification was erroneous in that it failed to allow as credits applicable to interim earnings during the backpay period the fact that those employee-discriminatees who operated in their own shops, in businesses owned by them, had found substantially equivalent employment which they preferred to their former jobs. Taking into account this factor would mean a tolling of the backpay period, for the affected discriminatees, and sharply reduced back pay specifications and backpay awards.

3. That the backpay specifications and any backpay awards are

barred by the laches and unreasonable delay of the National Labor Relations Board which haveseverely and permanently impaired and destroyed and prejudiced the rights of th Bagel Bakers Council and its employer members.

4. That the right to interest as part of a backpay award is barred by the laches and unreasonable delay and gap of time from the unfair labor practice to the backpay specification and the permanent impairment and prejudical loss of the rights of the bagel bakers council and its employer members resulting from such delay and laches on the part of the National Labor Relations Board.The addition of interest to any award would be wholly unjustified under the circumstances of this matter in view of the length of time the Board had this investigation and the destruction and loss of records by the members of the union and the discriminatees themselves,which have rendered totally inoperative and valueless the rights of the Council and its members,and the right to interest would be barred as a matter of fact and law.

5. That the backpay specifications are erroneous and grossly excessive in that they did not take into account the fact that many of the discriminatees did not desire or seek reinstatement and were not sent back to the member shops by the union.Hence the Council and its members were barred from reinstatement of the discriminatees in many cases by the action and inaction of the union itself,and its members,and by the operating procedures of the union during and after the lockout period and after the decision and order of Justice Rosling ordering reinstatment.

6. That the backpay specifications were erroneous and grossly excessive in that they failed to take into account and apply the operating terms of the collective bargaining agreement that was in effect prior to the lockout and after a new agreement had been consummated.Taking into account such collective bargaining agreement would have reduced the specifications by 70%.

7. The backpay specifications were totally defective and erroneous in that they took into account union records and union memorandums and union positions evidenced by union personnel and union minutes which have not been made available to the Council and its members.Failure to make available such documents and records and conversations and memorandums have and will unduly prejudice the rights of the respondents and have resulted in undue hardship to them,and the delay of the Board in computing the backpay specifications,under the circumstances where the union records have not been made available to the respondents,and the Labor Board records on same have not been made available to the respondents,have permanently eroded and destroyed the Council's rights. Accordingly the back pay award should be zero.

8. That the Neptune Brighton Bagels,Inc. party,not previously made a party prior to the hearings and back pay specifications ordinarily would not be a proper party because it would not be within the jurisdiction of theBoard because of its geographical limitations and because of its dollar volume. That such party was not a member of the Bagel Bakers Council at the time of the backpay periods and at the time of the unfair labor practice and the back pay award is barred as to its status by virtue of the foregoing.

Dated: August 5,1976

Yours,etc.

MYRON W. SISKIN
Attorney for Bagel Bakers Council and
its members
Office and P.O.Address
855 Ave of Americas,
New York City,New York 10001
212-683-1658

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER-MEMBERS

-and-

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONARY
WORKERS INTERNATIONAL UNION OF
AMERICA

Case No. 29-CA-887-1

ANSWER TO AMENDMENT TO BACKPAY SPECIFICATION

The Bagel Bakers Council of Greater New York and its employer members,by their attorney, MYRON W. SISKIN,answers the amendment to the Backpay specification issued in the instant matter as follows:

1. Denies each and every part of paragraph "1" of the amendment to the Backpay specification,except admits that at one time there was an agreement between certain ofthe respondents and Bagel Bakers Union Local 338,and further admits that at one timethere was an onbligation by certain of the respondents to makecontributions into the Local 338 Vacation and Holiday Fund for the year 1966.

2.Denies each and every part of paragraph "2" of the amendment to the Backpay specification,except admits that for the year 1966 certain ofthe respondents made contributions to the Local 338 Vacation and Holiday Fund,and such contributions were disbursed by the fund.

3. Denies each and every part of paragraph "3" of the amendment to the Backpay specification except admits that in 1966 the Vacation and Holiday Fund distributed to certain of the Baker claimants vacation and holiday fund payments in the approximate amount of $1,239.76,and to other of the claimants less, andthat for 1967 more than $224.44 was paidto the claimants,and that for 1968 more than -0- was paid to the claimants.

4. Denies each andevery part of paragraph "4" of the amendment to the back pay specification.

5. Denies each and every part of paragraph "5" of the amendment to the backpay specification.

6. Denies each and every part of paragraph "6" the amendment to the backpay specification except admits that for the year 1966 certain of the kettlemen were paid $590.06, and for other of the kettlemen less was paid, and that for the year 1967 more than $88.50 was paid and for the year 1968 more than -0- was paid to the kettlemen.

7. Denies each and every part of paragraph "7" of the amendment to the backpay specification.

8. Denies each and every part of the amendment to the backpay specification designated as "8".

9. Denies each and every part of the paragraph "9" of the amendment to the backpay specification.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

I

That the amendment is totally defective and erroneous in that it was premised on a computation of boxes of bagels produced and it failed to take into account boxes of bagels produced in 1967 and 1968 in any way.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

II

That the amendment was totally defective and erroneous in that it failed to take into account the fact that the "boxes of bagels" produced method was not applicable during the back pay specification period contended as being the backpay period by the NLRB and the claimants, and that the computation was thus totally in error and that a correct computation would reveal nothing due from the respondents.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

III

That the method that was actually used by the union in the computation of vacation and holiday pay for 1967 and 1968 was based upon daily payments of $3.50 per day for bakers and $2.50 per day for kettlemen, to be paid by the daily employers. That the computation of the NLRB contained in the amendment ignored this actual state of facts,ignored the actual realities of the situation,when same should have been accepted,and the computation further improperly disregarded the fact that full payments had been made of the holiday and vacation pay as provided for by the union and actually put into effect by the union.

ASAND FOR A FOURTH AFFIRMATIVE DEFENSE
IV

That payment infull has been made by the respondents or other parties,i.e.,non council members,so that no payment remains due for holiday or vacation pay or its equivalent for the claimants. Taking into account such payment would mean that there is no holiday or vacation pay due from the respondents,or no equivalent amount due for a like or similar benefit.

AS AND FORA FIFTH AFFIRMATIVE DEFENSE
V

That respondents have been denied due process of law in this matter as applies to the amendment,in that the amendment was granted without allowing the respondents adequate and just timeto oppose same,andwas granted as to amendment without allowing an adequate or any adjournment of the hearing within which to submit an answer to the amendment prior to testimony being heard therein.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
VI

That had the amendment actually computed benefits utilizing boxes of bagels produced,for the years 1967 and 1968 there would be no vacation ahd holiday pay due the claimants for 1967 and 1968,or in any event no more than 5% ofthe amount computed as being due,and that the amount computed as being due would have to have been apportioned among non council members and council members.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
VII

That the amendment failed to take into proper account the economi conditions prevailing in 1967 and 1968 as to the respondents. Taking into account the economic conditions and the reduced sales volume and labor opportunities for bagel bakers in 1967 and 1968 would mean that no holiday and vacation pay would be due to the claimants by the respondents.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

8.

That the computation of the amendment to the backpay specification was grossly excessive and defective in that it included periods subsequent to February 1,1968,the date the backpay tolled.By virtue of Judge Rosling's order in the U.S.District Court ordering the reinstatement of the union employees based upon seniority,and the compliace thereof by the respondents duly and lawfully brought into this proceeding,the backpay period tolled on or about February 1,1968,and the inclusion of periods after that date was totally in error.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

9.

That by virtue of the laches of the parties herein asserting the amendment to the backpay specification for holiday and vacation pay in that same was asserted an outrageous and unreasonable and grossly prejudicial time after any unfair labor practice had occurred and taken place,the amendment is barred,and interest is barred.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

10.

That the amendment to the backpay specification for holiday and vacation pay is totally and grossly defective and excessive in that it fails to give proper weight and proportion to the severely distressed financial situation of the respondents. Taking into account such financial condition during the subject years would mean that no backpay would be due the claimants herein as asserted in the amendment to the backpay specification.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

11.

That the amendment to the backpay specification was totally erroneous and excessive in that it charged council members with the entire holiday and vacation pay notwithstanding that noncouncil members were also responsible for same,and that they had made the required contributions as non council members during the subject years.Taking into account such obligations and payments by non council members would mean that no payments are due by the respondents herein.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

XII

That by use of the computation made in the amendment to the backpay specification,the claimants would be obtaining duplicate payment for the same benefit,and an unjust enrichment at the expense ofthe respondents and same would be an improper and unjust burden upon the respondents.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

XIII

That the computation made in the amendment was totally arithmetically incorrect.A correct arithmetical computation would resultin no additional backpay specification.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

XIV

That the statute of limitations has run as to respondent Neptune-Brighton Bagels,Inc. No service was effected as to respondent Neptune Brighton Bagels,Inc. until within three months ago. Any attempt to bring in said corporation at this time would constitute the taking of property without due process oflaw,and would be violative completely of said corporation's rights, said corporation never having been a party prior to such notice as it did receive by certified mail,of the backpay specification within three months ago. That the Board lacks jurisdiction over Neptune-Brighton Bagels,Inc.

WHEREFORE respondents demand that the amendment be denied in its entirety and that no determination should issue against respondents.

Yours,etc.

Dated: New York,New York
August 10,1976

MYRON W. SISKIN
Attorney for Respondents
Bagel Bakers Council and its
employer members.
855 Avenue of Americas
New York,New York 10001
212-683-1658

JD-597-76
Brooklyn, NY.

SUPPLEMENTAL DECISION-James L. Rose ,A.L.J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BAGEL BAKERS COUNCIL OF GREATER
NEW YORK AND ITS EMPLOYER-MEMBERS

and

Case No. 29-CA-837-1

BAGEL BAKERS UNION LOCAL 338
OF THE BAKERY AND CONFECTIONERY
WORKERS INTERNATIONAL UNION OF
AMERICA

Stephen E. Appell, Esq., of
Brooklyn, NY, for the
General Counsel.
Myron W. Siskin, P.C., and
Philip Levine, Esq., of
Brooklyn, NY, for the
Respondents except
Flatlands Bagel Bakery, Inc.,
Laurelton Bagel Bakery, Inc.,
and Neptune Bagels, Inc.
Stanley Bryer, Esq., and
David Kramer, Esq. (Friedlander,
Gaines, Cohen, Rosenthal & Rosenberg),
of New York, NY, for Oscar Stern.
Harriet Lewis, of Brooklyn, NY, for
Flatlands Bagel Bakery, Inc.

SUPPLEMENTAL DECISION

JAMES L. ROSE, Administrative Law Judge: This is a backpay proceeding which was heard before me at Brooklyn, New York, on various dates from July 19 through August 11, 1976. Upon the record as a whole, including my observations of the witnesses, briefs and arguments of counsel, I hereby make the following:

Findings of Fact

I. Procedural History

The Bagel Bakers Council of Greater New York and its various employer members were charged with having committed unfair labor practices principally by locking out their employees on or about February 1, 1967. The matter was heard before Trial Examiner Joseph I. Nachman who on March 28, 1968, rendered his decision finding, among other things, that in fact the Respondent had engaged in violations of Section 8(a)(3) by locking out their employees on February 1, 1967. This decision was affirmed by the Board on February 19, 1969. Bagel Bakers Council of Greater New York and Its Employer-Members, 174 NLRB 622 (1969). The decision of the Board was enforced by the Second Circuit on November 20, 1970. N.L.R.B. v. Bagel Bakers Council of Greater New York and Its Employer-Members, 434 F. 2d 884 (2nd Cir., 1970); cert. den'd, 402 U.S. 908 (1971).

Additional litigation involving this matter includes an injuction proceeding under Section 10(j) of the Act wherein on January 18, 1968, District Judge Rosling granted the Regional Director's petition and entered an order putting the parties back to the status quo pending a determination of the unfair labor practices by the Board. Kaynard v. Bagel Bakers Council, 67-C-776 (unreported). Decision on a subsequent joinder motion is reported at 68 LRRM 2140 (E.D. N.Y. 1968), A further decision in this matter by Judge Rosling denying the petition for a contempt citation is reported at 70 LRRM 2581 (E.D. N.Y., 1968).

Finally, in Silverman v. N.L.R.B., 92 LRRM 2919 (2nd Cir., 1976), the Circuit Court granted a petition for Mandamus directing the Board to determine the backpay award within 60-days from that decision. Accordingly, on June 24, 1968 the Regional Director of the 29th Region for the Board issued a Backpay Specification and Notice of Hearing which, along with the Respondents' answer, frame the issues to be decided herein.

II. Factual Background

While the underlying factual situation is set forth in detail in the earlier decision, a brief summary here is in order.

It is a monumental understatement to note that bagels are popular food items in the New York area. The taste for bagels as well as the art of making them immigrated from Middle Europe in the late nineteenth and early twentieth centuries. The method of making and baking of bagels did not change substantially until the early 1960's and even today, in many of the bagels bakeries, the bagels are handcrafted.

Thus, in the early years of the industry in New York City, that bagel bakeries were located in the basements of apartment houses, or other buildings where there was access to large furnaces which were converted into ovens. During that period the traditional method of baking bagels was to have a basic crew of four. Two individuals would mix the dough and form the bagel, and one would bake them. The fourth was a kettleman, or helper, whose responsibility it was to boil the bagels in water and do cleanup chores.

With the invention of the rotating oven, in the early 1960's, bagel bakeries were able to move to storefront locations because these ovens were movable, whereas the earlier brick ovens were not. This had the effect of changing the industry from a totally wholesale business to some retail. Still however, the basic method of baking the bagels was the same, requiring the crew of three bakers and one helper as the basic work force.

Also standard was the method by which the bakers were compensated. This was on a piece work basis whereby the baker, or foremen, received 29 cents per box (under the 1965-66 contract) and the makers each received 26 cents per box. The kettleman was on an hourly rate which, according to the testimony, figured out to be in the range of 14 cents per box. There are 56 bagels in a box and under the contract, each baker was guaranteed a minimum of 100 boxes per day. Thus, for the standard crew the bakery guaranteed 300 boxes of work. If a crew was called for and was unable to produce that many, or the bakery did not want that much, they would nevertheless be paid for their 100 boxes.

Also traditional was the way in which bakers were employed. A bakery owner would call the Union and tell the Union's business agent how many boxes of bagels be required for a particular day. The Union would then send the appropriate number of individuals. It happened that for the most part, the employers' requirements were generally consistent and generally they used the same people week after week. Nevertheless, since the requirements of any given bakery varied from day-to-day and week-to-week, it happened that most members of the Union would work for more than one bakery each week and during the year might work for as many as 15 different bakeries, on a sporadic and more or less ad hoc basis. The point is, the bagel bakers were sent to their jobs out of the Union hall, it was the Union to which employers looked for people, and it was the Union which controlled which job a given individual would go on. And this was true whether one was essentially a steady employee of one bakery, or worked for many different employers in the industry.

In 1936 Isadore Glass organized the Bagel Bakers Council for the purpose of dealing with the Union. According to Glass' testimony, during the early 1960's he sold his bakery and became a full-time advisor to the Council. At that time there were 36 members of a total of approximately 45 bagel bakeries in the Greater New York City area.

In the mid 1960's the industry began undergoing a fundamental change. Where the invention of the rotary oven had allowed the bakeries to move from their back street and basement environments to storefronts, the inventions of a bagel making machine and the inflex of frozen bagels had a substantial impact on the wholesale trade of these bakeries. Even after the rotary oven in effect opened retail trade, a substantial majority of each bakery's daily business was wholesale, either directly to delicatessens, groceries stores or the like or through jobbers who in turn would deliver the bagels to the retail outlets. The retail trade during the early 1960's for most of the Council members was insignificant.

However, with the inflex of the machine-made and frozen bagels, particularly into the larger grocery chains, these employers discovered that they were having a difficult time competing. Thus the testimony is that in 1966, for instance, most of the Council members were charging in the range of 50 cents per dozen bagels wholesale, but were advised that the machine bagels were wholesaling for in the range of 30 cents per dozen. Whatever the precise figures are with regard to the machine bagels, there is no question but what bagels made by machine began to come into the New York market in significant enough quantities that each of the Council members began losing substantial amounts of wholesale business.

Thus, the nature of the bagel baking business changed radically from one of being strickly a bakery to being a bakery in connection with other food related endeavors such as delicatessens, groceries stores or restaurants. And it is now the case that all of the employers here, while still maintaining their bakeries and still baking bagels, run their bakeries in connection with groceries or cafes.

Further, as the bagel industry changed from being strickly wholesale bakeries to retail outlets for bagels as well as other food items, the number of bakeries in New York increased substantially from 45 or so in the mid 1960's to something in the range of 200 now.

These circumstances are at the core of the basic dispute the Council had with the Union in 1966-1967 and which ultimately lead to the unfair labor practice. Specifically, in negotiations for a new contract, to replace the one which was to expire on

January 31, 1967, the Respondents asked for economic relief. Briefly the Respondents wanted the Union to take a reduction in pay, eliminate or reduce the guarantee as well as reduce or eliminate other fringe benefits. (Most of these goals were in fact agreed to by the Union for noncouncil members during the lockout and for the Council in October 1968).

In connection with their bargaining posture, which was found to be an unfair labor practice in violation of Section 8(a)(5), the Respondents decided to lockout all of their employees beginning February 1, 1967. Thus, from and after February 1, 1967, the Respondent refused to allow members of the Union to work in their shops. Such as was performed throughout the backpay period was done by owners of the various bakeries and nonunion employees. Prior to the lockout the owners did not do any of the craft work.

III. The Backpay Specification

In the Backpay Specification, it is contended that the backpay period runs from February 1, 1967, the date of the lockout to October 1, 1968, when a new collective-bargaining agreement between the Respondents and the Union became effective. It is also alleged that backpay liability as to certain of the Respondents terminated prior to October 1, 1968. 1/

A. Loss of Earnings

For purposes of backpay, it is assumed that but for the unfair labor practices, each of the discriminatees would likely have earned the same wages in 1967 as he would have earned in 1966. It is also assumed that each discriminatee would have earned the same amounts from each of the various employers for whom he work in 1966 in the same ratio. If, for instance, an employee earned half of his 1966 wages from one Council member and the other half from several noncouncil members, then absent the unfair labor practices, it is assumed he would have earned half of his wages from that particular Council member and the other half from noncouncil members during the backpay period. The backpay period then is divided into two sections -- 1967 and the first 9 months of 1968. To calculate the 1967 net backpay for each discriminatee, his particular interim earnings in 1967 are substracted from his 1966 gross earnings.

1/ As to Flatlands Bakery Inc., liability terminated on June 15, 1967, pursuant to the decision of the Trial Examiner. The liability of Culver Bagel Baker terminated on June 21, 1967 pursuant to the order of the Board.

Similarly to arrive at the net backpay in 1968, each discriminatees' 1968 interim earnings are subtracted from his 1966 earnings and then multiplied by three/fourths. Having arrived at the results for each section of the backpay period, the amount due from each Respondent is allocated according to the percentage that particular Respondent contributed to the employees'total earnings in 1966. Thus if a claimant's net backpay, for instance, was $5,000 and that claimant earned half of his 1966 earnings from one Council member, then that Council member's liability to that claimant would be $2,500. 2/

B. Holiday and Vacation Pay

Early on in the hearing it developed that the discriminatees also received a fringe benefit in the form of holiday and vacation pay during the base year which was not reflected in their gross backpay. Thus, Counsel for the General Counsel moved to file an amendment to the backpay specification in order to allege vacation and holiday pay as an additional item to be included as lost earnings.

During 1966, each employer paid into the vacation and holiday trust fund in an amount equal to 8 1/2 cents per box. This money was then distributed equally among the bakers with the kettlemen receiving a somewhat lesser amount. Thus in 1966 each of the bakers received $1,239.44 in vacation and holiday pay. Each baker also received approximately $224 in 1967 for holiday and vacation pay accumulated to the time of the lockout.

2/ It is noted that in framing the Backpay Specification the Regional Director determined to calculate the backpay on yearly rather than quarterly periods because of the particular nature of this industry, namely that employees moved from one employer to another, not all of the employees in the industry were involved in the unfair labor practice and the industry is somewhat seasonal. Thus to use all four quarters as the base year would appropriately reflect seasonal adjustments. While this does not strickly adhere to the formula, in F. W. Woolworth Co., 90 NLRB 289 (1950), such seems reasonable under the special facts of this case. And the policy considerations prompting the Woolworth determination to calculate backpay on a quarterly basis are not present here. The fundamental concern in Woolworth involved protracted periods of discrimination, and the realization that once a discriminatee finally found other employment, if it was at a higher wage, ultimately his interim earnings would exceed the total backpay. Thus it would be to a respondent's advantage not to offer reinstatement and thus toll backpay. Such considerations (Continued)

Following the lockout the employers in the industry still using bakers changed the method of compensating for vacation and holiday to a straight $3.50 per day for each day an employee worked. This amount is reflected as earnings and is included in each of the claimant's intermin earnings from noncouncil members in 1967 and 1968.

The General Counsel contends that the total amount of $1,239.44 should be allocated, on a pro rata basis, to each of the Respondents for each discriminatee. In the alternative it is contended that holiday and vacation losses should be calculated as a proportion of $1,240 as to each claimant's 1966 earnings from Council members.

IV. The Burden of Proof

In the original answer to the backpay specification the Respondents, in addition to a general denial, enumerated 51 separate affirmative defenses, many of which are conceptually overlapping. In the answer to the amended backpay specification relating to holiday and vacation pay, the Respondents set forth 14 separate affirmative defenses. The Respondents defenses will be treated herein according to subject matter.

It should first be noted that the burden of proof on most of the items raised during the course of this hearing is on the Respondents. Thus:

> . . . in a backpay proceeding the burden is on the General Counsel to show the gross amounts of backpay due. When that has been done, however, the burden is on the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability. N.L.R.B. v.

2/ (Continued) are not present here. The backpay period lasted just one year. Most employees had earnings throughout, but such as would be credited as interim earnings cannot, with certainty, be allocated to a particular quarter.

Finally the data available, both to calculate gross backpay as well as interim earnings, is not in form to use a quarterly method with any expectation that such would be more accurate. From the nature of this case, and the evidence presented, I do not believe that the claimants will be penalized nor the Respondents rewarded by computing the losses on a yearly basis.

However, I do not believe it reasonable to include as expectant earnings, and therefore gross loss, 1966 earnings from other than Council members. Under the General Counsel's theory the Respondents would be liable even for a claimant's lost noncouncil earnings. I therefore will find the gross loss to be only the 1966 Council earnings. See Section on Formulae and Remedy.

Brown & Root, Inc., 311 F. 2d 447, 454 (8th Cir., 1963).

Further, as the Board recently said:

> . . . the backpay claimant should receive the benefit of any doubt rather than the Respondent: the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. Southern Household Products Company, Inc., 203 NLRB 881 (1973).

Finally, recognizing "the impossibility of exactitude," N.L.R.B. v. Rice Lake Creamery Co., 365 F. 2d 888 (D.C. Cir., 1966), in devising the backpay formula, an approximation of what would have been earned during the backpay period is permissible. Such is obviously applicable to this situation, given the nature of the industry, and the lapse of time between the backpay period and the current proceeding which necessarily has had the effect of limiting the evidence available.

In short, having presented a formula reasonably calculated closely to approximate the loss of earnings suffered by each of these claimants as a result of the Respondents' unfair labor practices, the burden is on the Respondents to show that for any given claimant no backpay is due or the amount of backpay should, for some reason, be mitigated

V. Respondents' Defenses and Conclusions

A. The Backpay Period

The Respondents contend that the backpay period should toll on or about February 1, 1968, because pursuant to an order of Judge Rosling in the 10(j) proceeding, supra, the Respondents in fact offered full and complete reinstatement to the locked out employees.

On this point generally, Counsel for the General Counsel contends that the Respondents did not actually contact the individual discriminatees. Accordingly the backpay liability should not be tolled until October 1, 1968, when the parties entered into a new collective-bargaining agreement.

In an agreement with the Respondents, I conclude that the backpay period should toll on February 1, 1968, irrespective of the fact that the companies did not make specific offers of reinstatement to specific individuals.

At the time material in this industry, it was more common than not for an employer to be assigned employees by the Union. It was not common for an employer to call an individual union member for work. Indeed this was not even permissible under the contract. Nor as a matter of fact in practice did specific employer call specific employees, even though in some situations an employer-member of the Union might work on a regular bases for a specific employer. Nevertheless, given the nature of this industry and this factual situation, I am persuaded that it was sufficient for the Respondents to have contacted the responsible representative of the Union to advise that the lockout was over and that they would accept employees back. The Union was the employees' agent for purposes of receiving the reinstatement offer. Lipman Bros. Inc., 164 NLRB 850 (1967).

In fact, following Judge Rosling's order of January 18, 1968, the Union's then business agent sent a telegraph to Council members applying for reinstatement on behalf of the Union's locked out members. He further said, "Please communicate with the undersigned to make all necessary arrangements for the commencement of their employment . . . "

On February 1, the Council sent a telegram to the Union to the effect that in compliance with Judge Rosling's order, the lockout was over and the employers would hire members of the Union.

Further, each of the principals of the various Respondents testified, without contradiction, that after February 1, he personally contacted the Union's business agent and requested the appropriate number of employees for his specific production needs. And there is evidence that the Union did in fact send its members to some of the various employers.

Each of the claimants who testified on this point agreed that notification concerning returning to work after the lockout would come from the Union, and not to them directly from the Council or individual employers.

Parenthetically, there is some testimony to the effect that the return to work in February was "a cooling off period," that a second lockout occurred in April 1968 or that the Respondents did not in fact comply with the order of Judge Rosling. 3/

3/ The Respondents contend that inasmuch as the Regional Director sought a citation in contempt of the January 18 order, which was denied, therefore the backpay period must be deemed to have tolled. I do not believe that Judge Rosling's decision not to hold the Respondents in contempt is res adjudicata of the tolling issue. Acts or ommissions of the Respondents which might not be considered contemptious, might nevertheless not be considered sufficient performance to toll backpay liability.

Normal January earnings from noncouncil members would be:

The Respondents actually contacted the Union, which was their source of employees and some members of the Union (claimants here and others) in fact did go to work for various of the Respondents. I therefore conclude that the Respondents did everything reasonably necessary to end the lockout and rehire the claimants. Under the circumstances of this industry I conclude that the Respondents were not required to contact each individual member of the Union, or even those who had worked a particular Respondent in 1966, in order to toll the backpay period. The Respondents acted consistently with the industry practice in an effort to bring the employees back to work. In fact the Union knew this, and presumptively, so did the discriminatees.

The indication of some claimants that the return to work was preplanned to be of short duration, or that it was followed by a second lockout, is only that. There is no evidence that the recall in February should not be found an end to the lockout if, as I conclude, the offer of reinstatement at that time was total and unconditional. To the extent that the Respondents did not have as much work available as before the lockout does not mean the backpay period should continue, as suggested by the General Counsel.

B. Exclusion of January 1967

The specification includes in the backpay period January 1967, irrespective of the fact that the lockout did not began until February 1, 1967. Counsel for the General Counsel argues that this permissible inasmuch as earnings for the month of January 1967 are also included as interim earnings and thus the Respondents are not prejudiced. While this may or may not be the actual situation with regard to each of the discriminatees, it certainly need not be. It could be, for instance, that one or more of the discriminatees had no interim earnings, in fact, in January 1967. If such were the case, then the Respondents would be liable for backpay for some amount during a period when they had not committed the unfair labor practice. Accordingly, in agreement with the Respondents, I conclude that the month of January 1967 should be excluded from the backpay period, and I find that the backpay period runs from February 1, 1967, to February 1, 1968.

C. Loss of Work Availability

The principal contention of Respondents is: as a result of fundamental changes in the industry, supra, each employer suffered a substantial amount of business loss which resulted in a dimination of the number of jobs available during the backpay period. 4/

4/ Although framed in various ways, this basic contention is the substance of the following paragraphs in the Respondents' answer: I, V, VI, VII, VIII, IX, XII, XVII, XXII, XXVII, XXXVIII, XXXIX, XXXL, XXXLI, XXXLII, XXXLIII, XXXLV, XXXLVI, and XXXLVIII.

Through corporate records and other documentary evidence, for each Respondent it was established that in 1967 there were substantially reduce bagel sales. Since payroll is directly proportional to sales, reduced sales necessarily would reduce the amount of work available for members of the Union and specifically the discriminatees herein.

At the outset, it should be noted that this defense is available in mitigation of damages if the Respondents are in fact able to carry their burden of proof. N.L.R.B. v. Mastro Plastics Corp., 354 F. 2d 170 (2nd Cir., 1965). Of course the loss of work, and therefore loss of job availability, must be related to factors apart from the unfair labor practices which the Respondents were engaging in.

On the basis of the record, I am satisfied that in fact there was a fundamental change in the bagel industry beginning in 1966 which did have a substantial effect on the work available in each of the Respondents' bakeries in 1967. The Respondents lost most of their wholesale trade. Their sales in 1967 were primarily retail and as a result, there was much less work available.

The Respondents therefore contend that the amount of backpay liability of each should be reduced by the same percentage as their loss of business in 1967 compared to 1966. Documentary evidence suggests that this loss ranged from 60 to 65 percent. Thus, the Respondents argue that their backpay liability should be reduced by that amount.

In my view, however, the amount of business a given Respondent lost in 1967 in not material. What is material is how much business remained. The issue is how much work would reasonably have been available to the discriminatees but for the Respondents' unfair labor practices. It is the amount of bagel baking business that each Respondent in fact had in 1967 which is critical in determining their limits of liability.

To determine the amount of bagel baking work available in 1967 requires calculating the bagel baking payroll and this in turn is dependent upon how many bagels each Respondent baked in 1967. This can be done, perhaps not with space-age exactitude but at least with reasonable closeness so as fairly to calculate the extent to which each of the Respondents liability ought to be limited.

Joseph Rubenstein, of Rubenstein Bagels, Inc., submitted into evidence production and payroll records for 1966. They show

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NLRB 716 (1962). There should be deducted from the amounts due each individual any tax withholding roughly that the bagel baking payroll was approximately $1 per box. Thus for the week ending January 14, the payroll was $3,505 and 3,510 boxes were produced (a payroll per box a ratio of $.99). In the week ending August 12 there were 2,058 boxes produced with the payroll of $2,101 (a payroll per box ratio of $1,02). And in the week ending December 16, there were 1,407 boxes produced with a payroll of $1,358 (a payroll per box ration of $.96).

In addition, Louis Madorsky, of Bageltown, Inc., testified that in 1966 the basic bagel baking crew consisted of two makers, one baker and one kettleman who total wages for 100 boxes came to approximately $100.

Finally, the corporate income tax return of Tri-Boro Bakery for the fiscal year ending January 31, 1967, shows sells of $415,954 and bakers wages of $96,370. Dividing the sells by the bakers wages (415,954/96,370 = 4.32) and dividing that result by 56, the number of bagels in a box, establishes that Tri-Boro was charging $.07 per bagel. This retail charge for a bagel conforms to the memory of those employers who testified.

These items of evidence are mutually reinforcing, each independently establishing the ratio of sales to payroll. I therefore conclude that a reasonable way to calculate the amount of bagel baking payroll available at each Respondent bakery during the backpay period would be:

Total bagel sales 1967/$.07 X 56 = boxes sold
Boxes sold X $1.00 = payroll
Where $.07 = retail price per bagel
56 = number of bagels per box

It is noted that all of the employers who testified said that in fact they did bake bagels in 1967 and that the work was performed by either themselves or the members of their families. The amount of bagel payroll thus is not accurately reflected in their corporate tax returns or other records, inasmuch as these individuals, who in all cases were officers of their respective companies, received salaries as such, as distinguished from any wages which might have been paid for production work. In short, the employers' testimony establishes that more bagel production occurred in 1967 than is reflected in their payroll records.

Where the records submitted are for fiscal years different from the period February 1, 1967 to February 1, 1968, I have taken the closest fiscal year compatible with the backpay year. While this may bias the result somewhat, the error, if any, should not be too great and in any event this is the best that can be done with the data available. The assumption is that each Respondents' business between February 1, 1967 and February 1, 1968, would be essentially the same during any proximate 12-month period.

Far Rockaway Bagel Bakery, Inc.

For Tri-Boro Bagel Co, Inc., for instance, the formula is applied as follows:

Year ending Janaury 31, 1968 sells $2,028,642.
$2,028,642 ÷ $3.92 = 58,327 boxes = $58,327 payroll.

Thus the limit of Tri-Boro liability would be $58,327. The evidence is, and I find, that none of Respondents' production during the period was performed by Union members. But absent the unfair labor practice, at least this amount of work would have been available to the locked out employees. The liability limits for the Respondents are set forth in Appendix 47. Where, as in the case of Pop's Bagel Bakery, Inc., as sucessor to, D & H Bagel Bakery the limit is less than the backpay found due, the amount of each claimant's entitlement is pro rated accordingly.

D. Overtime Prohibition

The Respondents further argue that inasmuch as the contract in existence in 1966 prohibited employees from working overtime and inasmuch as this provision was in fact enforced, in no event could the backpay due each employee exceed $113 per week -- the guaranteed minimum times four. In essence, the Respondents argue that to allow a discriminatee to recover more than this amount would be tantamount to rewriting the contract, by allowing the claimants to recover for overtime which the contract prohibited.

This defense is without merit. It is true that the contract does have a limitation of overtime provision, and it does appear that on some occasions the Union did enforce this provision in order to spread out the available work to its members. It is also quite clear from the totality of the record that most of the employees in fact work more than the minimum on each day that they were employed. The overtime clause was not a devise to limit a Respondents' payroll. Rather it was designed to protect employees who wanted to limit their workday to 100 boxes, and also to protect employees generally so that in slack periods the work available in the industry would be spread around. These factores, particularly including the fact that during the base period employees did work "overtime" leads to the conclusion that but for the Respondent's unfair labor practices, the discriminatees could have expected to have worked the same amount in 1967 irrespective of the contract provision. The test in determining the amount of backpay owing is how much the discriminatee might reasonably have expected to earn but for the employer's unfair labor practices. To the extent any of a claimant's backpay may include "overtime," such is nevertheless not diminished.

E. The Basic Assumption

The Respondents also contend that the basic assumption of the Backpay Specification -- that absent the unfair labor practices the claimants would have earned the same in 1967 as they did in 1966 -- is erroneous. 5/ As indicated above, this assumption appears reasonable. The Respondents brought forth no evidence of probative value to suggest that the assumption is not reasonable, other than that submitted for their basic economic defense. Inasmuch as I have concluded that the Respondents' liability will be limited only to the amount of bagel payroll which actually existed in 1967, so much the Respondents defense as is based upon this factor is affirmed.

So much of the Respondents' defense that the assumption is generally erroneous is rejected as not having been sustained by competent, probative evidence.

F. Loss of Business

The Respondents also contend that in addition to the loss of work availability, each employer was in a sufficiently disadvantageous economic condition so that there was little work available for the claimants during the backpay period. 6/ Again, to the extent that this affirmative defense is addressed to the question of reduced sells and therefore work availability, such as been considered above. To the extent that the Respondents meant to establish a separate defense, there is no competent, probative evidence to sustain it.

G. The Base Year Calculations

In paragraph XVIII of the answer, the Respondents claim that the calculation of each claimant's 1966 gross earnings as well as his interim earnings are not based upon reliable or best evidence. While approximation had to suffice in some cases, given that this hearing was conducted some 10 years after the base period, it is expected that the best evidence would not be available in every case. I am nevertheless satisfied that on balance the calculation of each discriminatees' gross earnings in 1966 is well as his subsequent interim earnings are as accurate as can be reasonably expected. Further, the Respondents brought forth no specific evidence of inaccuracies. On the other hand, in those few cases where data as to a given claimant was shown during testimony to have been inaccurate, the calculations have been corrected and the backpay due reflects the corrected data.

5/ Affirmative defenses: III, IV, XXV, XXVI, XXXV, LI.
6/ Affirmative defenses: X, XV.

H. The Discriminatees Would Not Have Worked for the Respondents

The Respondents argue that because of the change in the economic condition of the industry generally, and of the Respondents in particular, resulting in a reduced amount of work available, even had there had been no lockout the claimants would have been willing to work for any of the Respondents. Accordingly they should not be entitled to backpay. At best this is pure speculation and cannot be accepted. The benefit of any doubt on this, as well as other issues, must be resolved in favor of the claimants. Accepting the facts in the light most favorable to the Respondents still leaves a doubt with regard to whether or not the claimants would have worked had they not been locked out. This defense must be rejected.

I. The Claimants Did Not Want to Work and Refused to Work

Similarly, the Respondents' defense that the discriminatees did not want to work (paragraphs XVI, XVII and XXI), is speculative and is rejected as is the Respondents' defense that the discriminatees refused offers of employment (paragraphs XXIV and XXX). There is no evidence of a specific Respondent offering work to any specific claimant which was refused.

Along this line, the Respondents also argue that the claimants did not make themselves available (paragraphs XVIII and L). For the same reasons as is outlined above and in the previous section, this defense is rejected.

J. The Union's Referral System

The Respondents contend in paragraph XIX that the nature of the Union's referral system would have limited the work each claimant would have been assigned in 1967. Hence to that extent the backpay of each claimant ought to be reduced. This again is a speculative argument which has no real basis in probative evidence and upon which the Respondents have not sustained their burden of proof.

K. Seniority

The Respondents argue that somehow the seniority of the various claimants would have affected which one got work, thereby reducing the amount of backpay owning (paragraph XX). The Respondents did not explain their theory in this regard, nor offer evidence in support. This defense will be rejected.

L. Interim Earnings

It is further contended that each of the discriminatees had more interim earnings than were credited in the specification (paragraphs XXIII and XXIV). It should be noted that pursuant to the Second Circuit decision in Mastro Plastics, supra, in fact Counsel for the General Counsel had available for examination all of the discriminatees except those who by agreement were not required to testify. In some cases, as a result of examination, it was concluded that additional interim earnings should be credited and to the extent such is the case, the backpay calculations as to those individuals have been changed.

In general, however, there is no evidence running to all of the claimants that the interim earnings admitted to by Counsel for the General Counsel is not an accurate reflection of each claimant's actual earnings during the backpay period.

M. Self-Employed Claimants

Following the lockout a number of claimants took up the buiness of bagel baking. The Respondents contend that these discriminatees, once they started their own businesses, thereby took themselves from the available labor pool. From the time they started their own businesses, they should be considered not to have been available for work and the backpay period as to them should be tolled accordingly.

Generally when one makes himself unavailable for work his backpay is totaled. But I cannot conclude such was the situation here.

First, I do not believe that the discriminatees should be penalized for doing what they were required by law to do, namely mitigate their losses. Since work was unavailable to the discriminatees from the Council members, and presumptively not enough for all was available from noncouncil members, to remain in this industry, the only alternative for the discriminatees was to start their own bakeries. But they did not thereby make themselves unavailable for work for Council members because of the nature of the industry. They could very easily have worked in their own shops and still be available to work with the Council members on the periodic basis which most of their work was done.

Finally, as the Board said in Heinrich Motors, Inc., 166 NLRB 783, 785 (1967): " . . . self-employment is not the equivalent to a wilful loss of earnings (e.g., withdrawal from the labor market) but is to be treated as other interim employment." Accordingly, I reject the Respondents' defense that when a given claimant open his own bakery during the backpay period, he thereby made himself unavailable for work and should be penalized. Of course, such earnings as these claimants had in self-employment are credited as interim earnings.

N. Unavailability is Result of Interim Jobs

Similiarly, the Respondents argue that because the discriminatees had earnings through interim jobs both in and out of the industry, they thereby waived their entitlement to backpay (paragraph XXVIII). This argument, as with the self-employment defense is rejected. It is unreasonable to penalize an individual for doing that which the law requires him to do. By attempting to mitigate damages, a claimant does not waive his entitlement to recover his losses.

O. The Claimants Did Not Mitigate Damages

In paragraph XXII, the Respondents raise precisely the converse argument. That is, the Respondents contend that the claimants should be denied backpay because they did not attempt to mitigate damages by getting other jobs. There is no evidence that any claimant did not attempt to find work. While this defense has legal merit, the Respondents nevertheless have the burden of establishing it by a preponderance of the evidence which I conclude they have not done. In fact each claimant is shown to have had some interim earnings. Accordingly, this defense will be rejected.

P. Reduced Piece Rate

The new 1967 contract called for a reduction of the baker's piece rate from $.28 to $.26 per box. Thus, argue the Respondents', any backpay liability should be reduced by 7 percent, the amount of the rate reduction. In effect the Respondents are asking for a conclusion that absent their unfair labor practices, the Union would immediately have agreed to a new contract with the lower rates. Such a conclusion is not warranted. Even though as a result of collective bargaining the rate structure was changed, as were other economic benefits,such does not mean that the Respondents have sustained their burden of proving the backpay assumption to be erroneous. Again, any doubt must be resolved in favor or the claimants. And here, at least, there is a doubt concerning whether and to what extent the reduced rate would have affected the claimants' earnings in 1967. Accordingly, this defense is rejected.

Q. Vacation and Holiday Pay

The Respondents make a number of defenses with regard to the General Counsel's amended specification to include vacation and holiday benefits. In addition to the basic theory of the calculations, which will be discussed below, the Respondents' contend: that this item is barred by latches; that to amend the specification results in denial of due process; that no credit was given for the fact that noncouncil members also contributed; that the formula was changed in 1967; that the computations are inaccurate; that the boxes of bagels produced were reduced (which is essentially the economic defense the Respondents contend for backpay generally) and that the backpay period was tolled.

With regard to the matter of latches, I conclude that the General Counsel, on behalf of the claimants, is not barred from bringing forth this item. It is a legitimate item of loss.

The specific theory upon which this item of backpay was not told the Respondents until during the hearing. While such is unfortunate, nevertheless it should not operate to deprive the claimants from recovering the total amount due them as the result of a discrimination against them, nor should it operate to allow the Respondents an economic benefit as a result of their unfair labor practices. Finally, the Respondents have cited no authority for their proposition in this respect.

The Respondents claim lack of due process notice with regard to the amendment to the specification. It is noted that in fact prior to the time that Counsel for the General Counsel actually submitted the amendment on August 5, there had been more than 2 weeks of testimony concerning this particular issue. I conclude that the Respondents had ample notice of this particular issue to frame their defense. And in fact, the Respondents did meet this issue both by formal answer and by interrogation of the witnesses, both before and after the amendment was submitted. I conclude that the Respondents were not prejudiced by the amendment, or by my denial of a continuance of the hearing.

However, in agreement with Respondents I conclude that proposed method of computing the amountdue each claimant is inaccurate.

In brief, by the amendment it is sought to recover from Respondent the total amount of vacation and holiday pay each claimant received in 1966, regardless of how much employment that claimant had for a particular Respondent. No consideration is given for the fact that in 1966, for instance, some amount of the vacation and holiday pay which a claimant received was paid by noncouncil members. Thus the formula sumbitted is rejected in favor of the one set forth below (which is essentially Counsel for the General Counsel's alternative).

P. Specific Neptune-Brighton Defenses

Neptune-Brighton Bagels, Inc., argues additionally that the Board lacks jursidiction to enter a backpay order against it. Although Neptune-Brighton has been doing business since June 1967 and has been a member of the Bagel Bakers Council since that time, it was not made a party to this matter until served with the Backpay Specification in June 1976. Thus it argues, having not been made a party to the underlying case, the Board has no juridiction to enter an order here. Neptune-Brighton further argues that it is not a successor to Neptune Bagel Bakers, Inc., and therefore would not be liable under the Board's order as enforced by the Second Circuit, in any event. Both of these defenses are rejected.

With regard to the question of jurisdiction, while it may have been better practice to have served Neptune-Brighton, I cannot but conclude that as a member of the Bagel Bakers Council prior to the trial of the unfair labor practice herein, Neptune-Brighton had actual notice of the proceeding. In fact its agent, the Council, was notified and did participate making all the defenses available. The mere fact that Neptune-Brighton was not itself served with formal papers in this case does not mean that the Board does not have jursidiction over it with regard to remedying the unfair labor practice of its predecessor.

With regard to the question of successorship, it is noted that the principal owner of Neptune-Brighton was in fact an employee of Neptune until the time of the lockout. At that time or shortly after, Neptune apparently cease doing business. A few months later that employee, Donald Chakofsky bought the business, namely the equipment and "good will." He took a lease from the owner of Neptune and began operating the bakery doing the same work in the same building.

Since Neptune-Brighton joined the Council and joined the lockout, it of course did not use the same employees as Neptune, except for the now owner. Nevertheless, it is reasonable to conclude that but for the lockout, Neptune-Brighton would have gone to the same employee pool as Neptune did, namely the Union. And as a union shop and Council member, it reasonably would have hired generally the same employees, if not precisely the same individuals.

In addition, Neptune-Brighton purchased Neptune's "good will" for $5,000 which certainly is an indication of a continuity business enterprise. Neptune sold its trade name, the right to use its telephone number and, importantly, agreed not to compete with Neptune-Brighton within the Burrough of Brooklyn for 10 years.

Finally, Neptune-Brighton did join the Council, even though on notice that a labor dispute existed between the Council and the Union. Chakofsky testified that he knew of the labor dispute but did not know of the "lockout." I discredit any inference sought to be advanced that he purchased Neptune's business innocent of any knowledge that Neptune was involved in a labor dispute. Chakofsky, after all, was an employee of Neptune and a member of the Union. I therefore find that Neptune-Brighton was a successor to Neptune and is liable for its unremedied unfair labor practices. In addition, by joining the Council, Neptune-Brighton aligned itself with the Council's actions, including the unfair labor practices. *United States Pipe & Foundry Co.* v. *N.L.R.B.*, 398 F. 2d 544 (5th. Cir., 1968); *Golden State Bottling Co., Inc.* v. *N.L.R.B.*, 414 U.S. 168 (1973).

S. Neptune's Defenses

Neptune, which is alleged in the Backpay Specification to be liable jointly and severally with Neptune-Brighton, claims that it is a defunct corporation and should be excused from this action. While there is some evidence that it is defunct, and while I conclude that Neptune-Brighton is liable for the backpay amounts due herein, I cannot absolve Neptune from liability. It has already been adjudicated liable for damages resulting from the unfair labor practices. Whether it is now defunct and whether any judgment is now collectable is, of course, a different matter, one which is not appropriate for decision in this forum. The matter of liability however, and allocation of liability should stand.

T. Pop's Bagel Bakery Defense

Pop's Begal Bakery specifically argues that it did not merge with D & H Bagel Bakery, and therefore is not liable for D & H's unfair labor practices. This allegation was fully adjudicated and it was found that, "Pop's Bagel Bakery and D & H Bagel Bakery constitute a single integrated business enterprise which is responsible for remedying the unfair labor practices herein found," 174 NLRB at 632. Since the question of Pop's liability for the damages caused by the unfair labor practice at D & H has been adjudicated, this defense must be rejected.

U. Flatlands' Defense 7/

Flatlands Bagel Bakery, Inc., argues that inasmuch as the rate for a baker was reduced in 1967 following collective bargaining from $.29 to $.26 per box, the amount of backpay owing the baker herein should be reduced accordingly. Flatlands also argues that due to economic

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7/ Flatlands failed to file an answer and Counsel for the General Counsel moved for judgment. I hereby deny the motion. The case was at issue through the answer of the Council and even though (Continued) conditions in the industry, the president, of Flatlands who theretofore had not worked as a baker received permission from the Union to do so. Therefore the job of a baker was not available to the backpay claimants. Finally, Flatlands argues with the other Respondents, that the vacation and holiday pay formula changed in 1967 and therefore it has no liability for this factor.

With regard to these defenses, suffice to note that what actually happened during the early months of 1967 while Flatlands was participating in a lockout and what might have happened but for Flatlands' unfair labor practices are two different matters. In this case any doubt which rises as a result of Flatlands' unfair labor practices must of course be resolved in favor of the discriminatees and I do so.

There is no reason to believe that had Flatlands not been involved in the unfair labor practices, the rate for a baker would have changed any earlier than June 1967, when Flatlands' ceased its lockout. The same is true with regard to the work availability. There is no particular reason to believe that Flatlands would not have used a baker between February and June had it not been involved in the unfair labor practice.

Flatlands' liability, as the other Respondents, shall be limited based upon the formula set forth in paragraph C above, taking into consideration the economic downturn in the industry. Finally, Flatlands' argument concerning vacation and holiday pay is rejected for the same reasons as set forth above in section Q.

VI. Formula and Remedy

It is assumed that but for the unfair labor practices, each claimant would have earned in the bagel industry the same in 1967 as he did in 1966 and in the same proportions fully the various employers. Thus each claimants' loss of wages for 1967 would be his lost earnings from Council members, e.g., if a claimant had total earnings of $16,000, $8,000 of which was from Council members, then his loss would be $8,000 less any amount he actually received from Council members in 1967, and less any amount earned in January 1966.

The amount of backpay due a claimant would be the specific obligation only of the employers he worked for in 1966, and that on a pro rata basis. Since static earnings are assumed, a claimant's January 1966 earnings from Council members, equals his January 1967 earnings from Council members which in every case is the claimants' 1967 Council earnings. After Janaury the Council members did not employ the claimants. 8/ Therefore:

7/ (Continued) Flatlands stands in a somewhat different position than other Council members. I do not believe the General Counsel or Charging Parties have been prejudiced.

8/ Flatlands and Culver ended their lockout in June 1967 and their liability will be calculated accordingly.

1967 gross loss of wages $= C - C'$
where C = 1966 earnings from Council members
C' = 1967 earnings from Council members.

From the 1967 gross, 1967 interim earnings must be subtracted. Since almost all claimants normally had earnings from noncouncil members, the interim earnings would be those in excess of the norm. Thus if a claimant's 1966 total was $16,000 and his noncouncil earnings $8,000, his 1967 interim earnings would be only those earnings in excess of $8,000. Since the 1966 noncouncil earnings are not considered in calculating gross backpay, they must also not be considered in calculating interim earnings. An analogy here would be the discharged employee who had a second job. His earnings from the second job would not be considered in determining either his gross backpay or interim earnings. The existence of the second job is just not relevant to the issue of whether and to what extent the discharge from another job has caused him damage.

Further the pattern in the industry was such that the claimants worked for different companies with varying earnings in each year. Thus the noncouncil earnings will be taken in total rather than on an individual company basis in determining both the baseline noncouncil earnings (1966) and the interim earnings in 1967 and 1968. Thus:

$I = N' - N$
Where:
I = 1967 Interim earnings
N' = 1967 Noncouncil earnings
N = 1966 Noncouncil earnings
Net loss of wages 1967 $= C - C' - I$

No special adjustment need be made in order to exclude January 1967. Since January was not in the backpay period, it can be assumed to have been a normal, preunfair labor practice, month. Thus such noncouncil earnings as exceeded those in 1966 must have been earned after the lockout began, e.g., after February 1. Similarly, the Council earnings in 1967 were earned in January. These earnings (C') are subtracted from the 1966 Council earnings (C) to give the gross loss after February 1.

The 1968 loss is exclusive to the month of January. To determine what a claimant would have earned in Janaury 1968, but for the lockout, we need only to look to January 1967 - a prelockout month. It is assumed that each claimant would have earned in January 1968 from Council members what he in fact earned in Janaury 1967 (C'). Interim earnings for January 1968 again would be those noncouncil earnings in excess of normal. Assuming January 1968 to be an average month, January earnings in 1968 would be:

$N2/9$ where $N2$ = 1968 earnings, January through September.

Supplemental Decision in thiscase on Sept 10 1976 relative to

Normal January earnings from noncouncil members would be:

$N/12$ where N = 1966 noncouncil earnings.
$I' = N2/9 - N/12$ where I' is the January 1968 interim earnings, and
January 1968 net loss $= C' - I'$.

Note that the January 1967 Council earnings C' are subtracted from the 1966 Council earnings to arrive at gross loss for 1967 (February through December). This same amount is added in as the estimated gross loss for January 1968. Therefore in computing the backpay due, the January 1967 Council earnings can be ignored (to substract it and then to add it gives a zero sum). For computation purposes the gross loss of wages for the entire backpay period, February 1, 1967 to February 1, 1968, is each claimant's 1966 earnings from Council members (C). And,

$$
\begin{aligned}
\text{Net loss of wages} &= C - C' - I + C' - I' \text{ or} \\
&= C - I - I' \text{ or} \\
&= C - (I + I')
\end{aligned}
$$

Calculating holiday and vacation pay is somewhat complicated by the fact that the formula changed in 1967. But assuming the formula would not have changed except through collective bargaining, which is in fact what happened, it can be concluded that the vacation and holiday pay formula would have remained static throughout the backpay period.

In 1966 each claimant received $1,240. In 1967 each claimant received $224 from the fund, which amount must be credited as interim earnings.

The loss, however, attributable to the Council members is, of course, not the full $1,240-224, because in 1966 noncouncil members contributed their aliquot portion. Since the holiday and vacation contributions were on a production basis, as were earnings, it is reasonable to charge the Council members only for the loss proportionate to each claimant's earnings from Council members. Thus:

1967 lost H & W $= 1240 \times C/T - 224$ [9]
Where C = 1966 Council earnings
T = 1966 Total earnings

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[9] In the case of kettlemen, the appropriate figures are 590 and 89.

Finally, January 1968 loss holiday and vacation benefits would realistically be 1/12 of the 1966 benefits, again charging the loss of Council members proportionally.

Thus:

January 1968 loss H & W = 1/12 X C/T

Note the holiday and vacation formula is not consistent with loss of wages formula. To be consistent, only a proportion of the $224 (C/T X 224) should be subtracted; and, since $1,240 represents a 12-month period, a separate figure for January 1968 should not be included.

However, this is a legal determination more than a mathematical exercise, and on this point logical consistency must yield. This issue was litigated on the premise that the $224 was interim earnings all of which should be deducted. While the Respondents have the burden of proving interim earnings, certainly they can accept what is tantamount to the General Counsel's admission that all the $224 should be treated as such. It would not be appropriate, at this stage of the proceeding, to credit less than the whole $224 against such losses of vacation and holiday benefits as are found. Since the $224 includes, at least, January 1967 payments by Council members, it follows that a proporitionate loss for January 1968 should be added in.

The computations are based on data from the Backpay Specification except where corrected by stipulations of the parties and/or testimony of the claimants. All calculations are rounded to the nearest dollar, and as some earnings of claimants are minimal (less than .5 percent of total Council earnings) such are not included as being de minimis.

SUPPLEMENTAL ORDER 10/

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to the Formulae and Remedy set forth above, it is ordered that the below-named Respondents, their officers, agents, successors and assigns shall pay to each person listed below, the estates of those deceased, or where indicated to the Regional Director of Region 29, to be held in escrow, the amounts set opposite their respective names. Interest is to be added at the rate of 6 percent per annum in accordance with the formula set forth in Isis Plumbing & Heating Co., 138

10/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

NLRB 716 (1962). There should be deducted from the amounts due each individual any tax withholding required by Federal and State law:

Bagel Box, Inc.

Joseph G. Fleischman (deceased)	$ 38
Joseph Martinosky	2,336
Gerardo F. Russo	1,230
	$3,604

Bagel Town, Inc.

Marvin Blind	162
Lawrence Horowitz	9,790
Seymour Ostrofsky	384
Saul Sapadin	59
Jack Sugarman	1,226
	$11,621

Benson Bagel Bakery, Inc.

Ber Barth	$ 294
William Brier	41
Julius Brooks	16
Murray Fertel	402
Rachmil Lederstein	14
Samuel Provder	1,508
Joseph Silverman	1,903
Jack Todaro	173
	$4,351

Culver Bagel Bakery, Inc.

William Breier	$ 274
Julius Brooks	830
Murray Fertel	552
Rachmil Lederstein	919
Arnold Newkofsky	124
Gerardo F. Russo	1,595
Leon Spanier (decreased)	9
Jack Todaro	2,644
	$26,944

Far Rockaway Bagel Bakery, Inc.

Samuel Cutler	$ 9,343
Edward Haimowitz	385
Sheldon Hepner	29
Leon Lifshutz	2,869
Seymour Ostrofsky	158
David Siegel	1,975
Jack Sugarman	245
	$15,004

Flatlands Bagel Bakery, Inc.

William Breier	$ 246
Murray Fertel	84
Joseph G. Fleischman (deceased)	26
Leon Litshutz	32
Morris Minton	1,645
Abraham Zaffos	1,008
	$ 3,041

Golden Bagel Corp.

Abraham Baron	$ 645
Ber Barth	538
William Brier	335
Julius Brooks	156
Murray Fertel	84
Joseph G. Fleischman (deceased)	26
Rachmil Lederstein	99
Irving Levy	4,008
Arnold Newkofsky	7,647
Morris Schechter	4,633
Leon Spanier (deceased)	2,961
Jack Todaro	87
Jack Sugarman	22
	$ 21,241

Island Park Nassau Bagel Bakery, Inc.

Marvin Blind	$ 1,484
James Goodrich	37
Leon Lifshutz	32
Jack Ostrofsky	12,160
Ronald Ostrofsky	3,239
Jack Sugarman	191
	$ 17,143

Laurelton Bagel Bakery

Ber Barth	$ 244
Marvin Blind	180
Murray Boykin	949
William Brier	20
James Goodrich	37
Sheldon Hepner	29
Leon Lifshutz	597
Albert Rothstein	7,626
Saul Sapadin	386
Walter Schuettig	5,678
David Siegel	346
	$16,092

Nelson Bagel Bakery, Inc.

Isak Jakubowicz	$43
Gerardo F. Russo	9
	$52

Neptune Bagel Bakers Inc. and Neptune-Brighton Bagels, Inc., jointly and severally

Ber Barth	$ 1,504
William Brier	81
Murray Fertel	418
Joseph G. Fleischman (deceased)	1,977
Israel Goldenberg	1,902
Seymour Ostrofsky	89
Jack Todaro	87
Saul Sapadin	10
	$6,068

Rubinstein Bagel Inc. and Joseph Rubinstein, Morris Rubinstein, and Herman Reiter, d/b/a Rubinstein Bagels

Ber Barth	$ 56
Julius Brooks	24
Murray Fertel	50
Joseph G. Fleischman (deceased)	68
Isak Jakubowicz	1,619
Lionel Stone	4,188
Hyman Ustin	1,077
	$7,082

Tri-Boro Bagel Co. Inc.

Abraham Baron	$ 161
Marvin Blind	1,593
Murray Boykin	43
Ralph Brier	4,591
Julius Brooks	15
Murray Fertel	59
Joseph G. Fleischman (deceased)	189
James Goodrich	136
Edward Haimowitz	2,847
Sheldon Hepner	3,132
Seymour Ostrofsky	59
Saul Sapadin	386
David Siegel	74
Stanley Siegel	34
Emanuel Strugatch	1,790
Jack Sugarman	763
Jack Todaro	1,342
Israel Weiner	1,240
	$18,454

Pop's Bagel Bakery, Inc.

Ber Barth	92
Marvin Blind	131
Murray Boykin	313
Ralph Breier	43
James Goodrich	5,946
Edward Haimowitz	616
Sheldon Hepner	42
Leon Lifshutz	47
Seymour Ostrofsky	69
Gerardo F. Russo	22
Saul Sapadin	116
David Siegel	49
Stanley Siegel	5,559
Jack Sugarman	273
	$13,318

Pop's Bagel Bakery, Inc. as successor to D & H Bagel Bakery, Inc.
(See Appendix 48)

Murray Boykin	$ 4,092
Murray Fertel	18
Joseph G. Fleischman (deceased)	18
Eugene Moore	1,324
Seymour Ostrofsky	127
Samuel Provder	1,378
Gerardo F. Russo	11
Emanuel Strugatch	668
Markus Weisz (escrow)	1,921
Jack Sugarman	27
Israel Weiner	11
	$9,595

Dated at Washington, D.C. SEP 10 1976

James L. Rose
Administrative Law Judge

SUPPLEMENTAL DECISION AND ORDER, HOWARD JENKINS, JR.

Member, National Labor Relations Board

226 NLRB No. 121

D--1742
Brooklyn, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAGEL BAKERS COUNCIL OF
GREATER NEW YORK AND ITS
EMPLOYER-MEMBERS

and

BAGEL BAKERS UNION LOCAL
338 OF THE BAKERY AND
CONFECTIONERY WORKERS
INTERNATIONAL UNION OF
AMERICA

Case 29--CA--887--1

SUPPLEMENTAL DECISION AND ORDER

On September 10, 1976, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding.[1] Thereafter, Respondents filed exceptions, a supporting brief, and a brief supporting parts of the Supplemental Decision. The General Counsel filed limited exceptions, a supporting brief, and a brief supporting parts of the Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[2]

---

[1] The Board's original Decision and Order in this proceeding is reported at 174 NLRB 622 (1969).

The Administrative Law Judge found that the backpay period should toll on February 1, 1968, irrespective of the fact that the Respondents did not on that date make specific offers of reinstatement to specific individuals. We agree with this finding.

The record reveals that subsequent to the time the employees were initially locked out there was an injunction proceeding under Section 10(j) of the Act wherein on January 18, 1968, District Court Judge Rosling granted the Regional Director's petition and entered an order putting the parties back to the status quo pending the determination of the unfair labor practice charges by the Board.[3]

Following the court's order, the Union's then business agent sent Council members a telegram applying for reinstatement on behalf of the locked-out union members. The agent further requested, "Please communicate with the undersigned to make all necessary arrangements for the commencement of their reemployment . . . ."

---

[2] We find merit in the General Counsel's exception to the Administrative Law Judge's failure to add the sum of $1,279 to the 1967 non-Council or interim earnings of James Goodrich. The Administrative Law Judge's recommended Order is hereby amended to credit the appropriate Respondents accordingly. We also agree with the General Counsel's contention that the moneys owed to Markus Weisz should be paid directly to him rather than being placed in escrow.

Regarding moneys due Morris Minton, the record reveals that during the course of the hearing the General Counsel amended the backpay specification to show that his adjusted net backpay was $1,166. Accordingly, the recommended Order is modified to reflect the amended specification.

[3] Kaynard v. Bagel Bakers Council, 67--c--776 (unreported).

On or about February 1, 1968, pursuant to the Union's request, the Respondent sent the Union a telegram advising that the lockout was over and that the Respondents would reinstate discharged employees where employment was available.

In finding that the telegram to the Union was sufficient to toll backpay, notwithstanding the lack of direct communication to each employee, the Administrative Law Judge considered the following factors. At all times material in this industry, it was more common than not for an employer to be assigned employees by the Union. It was not common for an employer to call an individual union member for work, nor was it permissiable under the contract. In fact, under this industry practice, specific employers do not call specific employees, even though in some situations a union member might work on a regular basis for a specific employer. Each of the claimants who testified on this point agreed that negotiation concerning returning to work after the lockout would come through the Union, and not to them directly from the Council or individual employees. On the basis of the foregoing, unlike our dissenting colleague, we agree with the Administrative Law Judge's finding that given the nature of this industry, and the circumstances of this case, the Union was the employees' agent for receiving the reinstatement offer and it was sufficient for the Respondents to have contacted the responsible representative of the Union to advise that the lockout was over and that they would accept employees back.[4]

---

[4] There is evidence that the end of the lockout did not result in as many employees being returned to work as had worked previously. The Administrative Law Judge found, however, that there was a fundamental change in the bagel industry beginning in 1966 which did have a substantial effect on the amount of work available at each of the bakeries in 1967. The Respondents lost most of their wholesale trade. Sales in 1967 were primarily retail and as a result there was much less work available.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondents, Bagel Bakers Council of Greater New York and its Employer-Members (listed in the Administrative Law Judge's Supplemental Order), their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified.

Dated, Washington, D.C. OCT 28 1976

John A. Penello, Member

Peter D. Walther, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting in part:

The finding of the majority that Respondents, by their telegram to the Union on February 1, 1968, offered full and complete reinstatement to the locked-out discriminatees, thereby tolling the backpay period, is supported by neither the law nor the facts. Respondents should be liable for backpay until October 1, 1968, when the parties entered into a new collective-bargaining agreement.

In the underlying case, the Board found, inter alia, that by locking out employee-members of the Union, Respondent Council and its employer-members violated Section 8(a)(3) and (1) of the Act. The Board therefore ordered the Respondents to offer full and complete.reinstatement to each union member locked out, and also ordered the usual make-whole remedy terminating with the date of reinstatement.

On February 1, 1968, Respondent Council sent a telegram to the Union. The telegram stated in effect that Respondent Employers were prepared to reinstate discharged employees whose employment was available. The majority finds that this telegram constituted a sufficient reinstatement offer, and I emphatically disagree. In the first place, Respondents' offer is insufficient in that they did not make the offer directly to the discriminatees, but rather through the Union. Normally Respondents procured individuals through the Union and not by direct contact. However, in the situation herein, where Respondents had committed serious unfair labor practices and the names of the discriminatees were known to Respondents, no valid reason has been presented why the individuals involved should not have been directly offered reinstatement to remedy those unfair labor practices.

Furthermore, the telegram specifies that there were approximately only 14 openings whereas 45 employees are named in the backpay specifications. Thus, even assuming arguendo, that it was sufficient to communicate the offer only to the union, it is clear that at best, less than one-third of the discriminatees may have been offered reinstatement. Such an offer surely does not comply with the Board's Order requiring Respondents to reinstate all the discriminatees.

Moreover, the impropriety of Respondents' purported offer is manifested by their contention that the various employers did not have as much work available as before the lockout. The Respondents made no attempt to place individuals on a preferential hiring list. Further, the record reveals that, in many of the shops, owners and family members who had not performed the work of making and baking bagels prior to the lockout were performing such work during the lockout and after its purported end. Any claim that they may properly displace the discriminatees is obviously without merit.

I am puzzled by the failure of the majority to recognize the above considerations. In my view, the majority has failed to implement the remedy which the Board has fashioned. The discriminatees are not made whole for losses they suffered because of Respondents' unlawful conduct, and I am compelled to dissent.

Dated, Washington, D.C. OCT 28 1976

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

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arising as interim earnings from corporations such claimant owned.

EXCEPTIONS TO SUPPLEMENTAL DECISION OF ADMINISTRATIVE LAW JUDGE BY RESPONDENTS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER NEW YORK
AND ITS EMPLOYER-MEMBERS

-and-

BAGEL BAKERS UNION, LOCAL 338, OF THE
BAKERY AND CONFECTIONARY WORKERS
INTERNATIONAL UNION OF AMERICA

Case # 29-CA-887-1

BRIEF TO THE BOARD IN SUPPORT OF PART OF THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION, AND IN EXCEPTION TO PART, AND RESPONDENTS' EXCEPTIONS

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Administrative Law Judge James L.Rose issued his Supplemental Decision in thiscase on Sept.10,1976, relative to the back pay specification hearings held,pursuant to the Board's earlier decision in Bagel Bakers Council of Greater New York and Its Employer Members, 174 NLRB 622(enfd., N.L.R.B. v. Bagel Bakers Council of Greater New York and its Employer Members, 434 F.2d 884 (2nd Cir. 1970), cert.den. 402 U.S. 908(1971)

Counsel for the Bagel Bakers Council and respondent members respectfully requests the National Labor Relations Board to adopt those findings and recommendations of the Judge to which counsel for respondents has taken no exceptions, such findings and recommendations being supported by the clear preponderance of the credible evidence adduced at the hearings.

The General Counsel's Office's exceptions are disputed herein, as being erroneous, and counsel for Respondents herein takes issue with all of such exceptions of General Counsel except for "5" therein, contained on page 8 therein.

Counsel for Respondents herewith files certain exceptions to the Administrative Law Judge's Supplemental Decision.

Counsel for respondents respectfully requests that the brief to the Administrative Law Judge, attached hereto, be considered as the Brief to the National Labor Relations Board in support of the Administrative Law Judge's Supplemental Decision, to the extent that exceptions are not taken, and in support of the Respondents' Exceptions. A table of contents, and a table of authorities has been added.

Respectfully submitted

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Dated: October 3,1976

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TABLE OF AUTHORITES CITED

Authority	Page cited in brief
1. Binder Metal Products Inc. 154 NLRB No. 135(1965)	16
2. Bagel Bakers Council of Greater New York et al.vs. NLRB No 34186, Case # 29-CA-887-1	1
3. Golden State Bottling Co.Inc. vs. NLRB, No 72-702,Dec.5,1973	19
4. Isis Plumbing & Heating Co. 138 NLRB 716	1
5. Mastro Plastics Corp.vs NLRB,86 Sup.Ct. 1862, 384 US 972	14
6. NLRB vs Ellis & Watts Products,Inc. (CA 6, 1965) 51 LC 11,344 F2d 67	14
7. NLRB vs. L.Ronney & Sons Furniture Mfg.Co. CCA 9, 206 F2d 730,cert.den. L.Ronney & Sons Furniture Mfg.Co. vs. NLRB 74 Sup.Court,377, 346 US 937, 98 L.Ed.425,Rehearing den.74 Sup.Ct. 475, 347 US 914.	16
8. NLRB vs.Leviton Mfg.Co.CCA 2, 111 F2d 619,	18
9. NLRB vs. Teamsters & Allied Workers, Hawaii Local 996, CA Cal.313 F2d 655	18, 21
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER NEW YORK
AND ITS EMPLOYER-MEMBERS

-and-

BAGEL BAKERS UNION, LOCAL 338,OF THE
BAKERY AND CONFECTIONERY WORKERS
INTERNATIONAL UNION OF AMERICA

Case # 29-CA-887-1

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

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Supplemental Decision herein on September 10,1976 finding that Respondents which were member-respondents of the Bagel Bakers Council were liable for specified amounts to certain of their former employees,pursuant to prior determinations of the Board asto unfair labor practices. See Bagel Bakers Council of Greater New York and its Employer-Members, 174 NLRB 622(enfd. N.L.R.B. v. Bagel Bakers Council of Greater New York and its Employer-Members 434 F.2d 884(2nd Cir. 1970),cert.den. 402 U.S. 908(1971).

Counsel for Respondents respectfully requests the National Labor Relations Board to adopt those findings and recommendations of the Judge which Counsel for respondents takes no exceptions,as these findings and recommendations are supported by the preponderance of the credible evidence adduced at the hearing.

Counsel for Respondents respectfully takes the following exceptions to the Supplemental Decision:

1. The Judge failed to find the following specific facts:

(a) That having found that Respondents had lost most of their wholesale trade in 1967,the 1967 business being mostly retail business,that documentary evidence established without contradiction that the loss in volume in 1967 as compared to 1966,the year before the lockout, having been at least 60 to 65 percent(Pages 10 and 11 of decision),that having found that the payroll in the bagel bakerybusiness isdirectly proportional to sales(Page 11 of decision) and that only 35 to 40% of the previous payroll of 1966 existed as being the maximum available payroll opportunity for 1967,the inexorable fact the Judge should have found was that backpay liability must be reduced by exactly the same percentages. The effect of the judge's ignoring this percentage reduction in available work was to compute the discriminatee's back pay award on the assumption that such discriminatees would have been the only workers for the Respondent members,and would be made more than whole.
(Dec,Pgs.21-24,Pg.11 of dec.)

Said holding of the Judge granting the validity and efficacy and relevancy of the lost volume in business as an economic defense of the Respondents was not taken into account in his computations because he wrongfully assumed that all of the work available to the employees in 1967 would have gone soldy to to the discriminatees,notwithstanding the fact that he simultaneously ignored the fact that the discriminatees had interim earnings from non council members during 1967 which fact made the Judge's assumptions herein noted invalid and illogical. What the Judge did was to give 100% time effect to the discriminatees as being available to the discriminatees in relation to the job opportunities in 1967 and at the same time he ignored 1967 interim earnings and the time involved in 1967 actual earnings,so that what the judge did was to give more than 100% effect to the discriminatees as to work available in the respondent shops and to interim earnings concurrently. Giving effect to the judges formulae in his decision resulted in the judge admitting that the evidence was universally presented without contradiction of the reduced work available(only 35-40% of 1966 earnings),and at the same time he excluded 1967 earnings to the extent that they were less than 1966 non council earnings, so that he rewarded and gave the discriminatees for completely unrealistic and impossible job time availability in 1967 the benefits of "double time" and ignored the actual impossibility of such ever being the case as far as the discriminatees, who could never have been in "two places at one time" (dec.pgs. 11,13,21-24,Tr.1901-1910,1910-1914, 1905,1948-1950)

The correct result from applying the evidence before the Judge,which he admitted had established the economic defenses of the respondents would have to be a 60% reduction in all the Judges findings,so that the Judge wrongfully arrived at figures which were grossly overstated,and the correct amount should be 60% less than what was found,as to this error alone,even ignoring other errors herein setforth. (tr.1901-1910, 1905, 1914, 1948-1950,1681-1683,1700,1680,dec.pgs 13,21-24)(b) Interim earnings of the discriminatees were ignored by the Judge,unless they exceeded 1966 non council earnings of the discriminatees,and the Judge failed to find that Respondents should be given credit for actual interim earnings of the discriminatees during the 1967 year and the first month of 1968. In his novel and bizarre treatment of 1967 interim earnings (Page 22 of decision)and January 1968 earnings,the Judge awarded the discriminatees "annuities" of 1966 amounts of earnings of the discriminatees from council shops,and at the same time eliminated 1967 interim earnings actually earned,as a credit, so that the employees involved found themselves by the findings getting more than 100% credit for the time available to them,and the employers were not granted proper credit for 1967 full earnings of the employees. (Pgs 21-24 of dec.)(Pg.11 of dec.)

(c) That during the years 1967 and 1968 the practice throughout the industry was that the old pre-lockout formulafor holiday and vacation pay was completelywithdrawn and altered and superceded and replaced by a $3.50 perday contribution paid by employers in the industry. That such contribution was earned by all of the discriminatees on the days they worked for the year 1967 and in January 1968, so that by awarding holiday and vacation pay as part of his findings the Judge gave duplicate and compound effect to the discriminatees and a "profit" to the discriminatees, since they were placed by the judges decision in the absurd situation of having been paid holiday and vacation pay by employers as part of their interim earnings during 1967 and 1968, and getting a "second" award by such findings as were made by the judge herein.

(See Tr. 1499, Morris Skolnick, former union pres., Tr.1977, Sidney Levy, NLRB employee, 1978, Tr.2029, Harriet Lewis, of Flatlands Bakery)

What the Judge did was to ignore actual, historical holiday and vacation pay received by the employee -discriminatees during 1967 and 1968 from their non council member employers, and to ignore the actual$3.50 payments made by the employers, and to charge the respondents with a discarded contributions formula that was not in effect during 1967 and 1968/as reflected by the testimony which was never contradicted during the hearings. (Dec.pgs. 17-18, 23-24 (Tr.1499, 1977, 1978, 2029)

(d) That the holiday and vacation pay to be awarded to the discriminatees, if any, for 1967 and January of 1968 had to reduced by a percentage of the drop in sales volume for the respondents during 1967, which percentage was 60-65% as found by the Judge. (Pages 10,11 of decision, Tr.1948, 1949, 860, 864, 1277, 175, 1280, 1166, 1682, 1683, 1534, 1606, 1608, 1554, 1901, 1905) The exceptions noted in (a) and (b) herein, are applicable herein. (Dec.pgs.17-18, 23-24, Tr.1499, 1977, 1978, 2029)

(e) That the actual labor costs throughout the industry beginning Feb.1967 and continuing thereafter as actual costs and factors set forth in the prevailing union contracts were reduced 7% (from .28 per box to .26 per box). Testimony as to this reduction was not contradicted by any testimony, (Tr.2031) and the testimony was that such was the universal practice (Tr.2030). That to make the computation of back pay ignoring this 7% reduction unjustly enriches the discriminatees. (Dec.pg.17, tr.2030-2031)

(f) That the sales of bagels by Respondent Tri-Boro Bagel Bakery during 1967 was $128,687, and not the 228,642 used by the Judge in Appendix 46 and App.47 and 48. Testimony as to the fact that $228,642 sales figure represented bagel sales plus non bagel sales, and that non bagel sales amounted to $99,955 was undisputed and not contradicted, so that $128,687 was the correct grand total of bagel sales, or a reduction of 43%, for the year 1967. (Tr. testimony of Mr. Knopp, CPA, Tr. 1615, lines 19, 23) Applying the correction factor would mean a reduction of 43% in the Triboro findings by the Judge, and appropriate corrections on all data which utilized such erroneous figure of $228,642. The error of the Judge was apparently inadvertant, but significant in effect herein. (Dec.pg.12,13,21-24, and App.46,47,48)

(g) That labor for Triboro Bagel Bakery during 1967 would have been far less than projected by the Judge, since it would have been at least 43% less, just based upon the bagel sales of $128,687 as the testimony showed, and not the figure obtained by the Judgewhen the 228,642 sales figure was used on which he based projected 1967 payroll. (Tr.1615, lines 19,23, App.46,47,48 of decision, dec.pgs. 12-13,21-24)

(2) That the boxes of bagels produced were the key data for implementation of the holiday and vacation pay computation on which the holiday and vacation pay were to be paid discriminatees prior to the lockout. That no evidence was submitted by the NLRB as to the boxes produced during 1967 and January 1968. (Tr.1985)(Tr.1987) Taking into account the boxes of bagels produced would mean a reduction in 2/3(60-65%) of the holiday and vacation pay, even assuming the prior method of payment of holiday and vacation pay asexisted prior to Feb.1,1967 would have prevailed, so that holiday and vacation pay must as a maximum be not more than 1/3 of the 1966 amount. (See transcript portions cited in (1)(d) and dec.Pages 10 and 11) (Dec.pgs. 17-18,24, and all appendixes for discriminatees, 1969, 1972 1985, 1987, 1996, of tr.)

(3) That the allowance given to General Counsel during the hearings of granting an amendment to the Specification of back pay for holiday and vacation pay, during the hearings, and ten years after the back pay proceeding started with an allegation of unfair labor practice, without the granting of an adjournment to respondents to do investigative work, was a denial of due process to the respondents. That to grant the amendment would be a denial of due process. That the Judge erred in so allowing the amendment. (Tr.1969,1972, 1450, dec.pgs. 17,18)

Said grant of the amendment was a denial of due process by admission and ruling of the judge himself, when he

Tr.1450-

> "I just can't get over the fact that you are asking me to preclude the Respondent from having a reasonable period of time to form his defense on a specification that amounts to in excess of 90,000 dollars.
>
> ...
>
> ...
>
> "Well, with regard to this matter of recessing the hearing, Mr. Siskin, I think you have a well taken point frankly, and due process would require that.
>
> "However I am not going to allow it for this reason, the reasons that are not the Respondent's fault, and which reasons which I don't know or understand--morethan five years has elapsed since the Circuit Court entered its judgment enforcing the Court's order until the present time.
>
> "I am advised administratively that as a result there's inordinate delay...."
>
> (underscoring supplied)

The prejudice to the respondents, as a matter of fact and law was thus admitted by the Judge. His ruling in allowing the amendment was a highly prejudicial errorand violates thebasic principle of due process. (Dec.pgs. 17-18)

Nowhere in the record doesthere appear any explanation of the NLRB's reasons for its tardiness, or was it even contended that newly discovered evidence required such amendment. See Boris vs. Moore 253 F2d 523, 25 FR Serv. 15a,21, case 7,; Anderson vs. National Producing Co., CA 2nd 1955, 253 F2d 834,938.; Darcy vs North Atlantic & Gulq. S.S.Co.Inc. Ed. Pa.948, 78 F.Supp.662 After ten years of administrative delay, respondents were confronted with a sudden additional liability of$90,000 which they had no opportunity to investigate in advance of trial hearing, and there appears no reason for the granting of the amendment. (Tr.1450) See also Bernstein vs. M.V.Nederlandaache Amerikaansche, etc. (S.D.NY 1948) 79 F.Supp. 38,42)

(4) That the Judge erred in ruling that Donald Chayofsky was an employee of Neptune at the time he purchased Neptune, since the evidence was directly to the contrary (Pg.19, line 26, of decision, Tr. 1894) Nowhere in the transcript did it appear by any testimony that Donald Chayofsky was employed by Neptune (Oscar Stern) prior to Oscar Stern selling the Neptune store, at any time even recent to the purchase by Donald Chayofsky.

(5) The Judge erred in ruling that Neptune Brighton was a successor to Neptune (Dec.pages 19-20, since the following testimony established as a matter of law that Neptune Brighton was not a successor:

customers as wasthe case of the predecessor Neptune,all of Neptune Brighton's customers were retail customers,so that the nature of the Neptune Brighton's customers was completely different than Neptune's.(Tr. 1821,1822,1831)

B) The store previously operated by Neptune had been closed and was not an operating bagel shop on purchase(Tr.1822) and had been closed for four months.

C) The old status of the store premises was changed, a new lease was effectedby Neptune Brighton(Tr.1823).New employees were different than Neptune's employees.(Tr.1830)(Page 19 of dec. line 35)

D) The Neptune bagel operation was a "route" operation, completely different than the operation which Neptune Brighton conducted-retail.(Tr. (1821,1822,line 20)

E) A new tenancy operation had to be established by Neptune-Brighton by negotiation(Tr.1823,line 14) apart from and completely different from Neptune.

F) Most of the machinery of the predecessor operation, Neptune,was abandoned(Tr.1824,lines 5-10)The affidavit of the seller listed NO debts,at the sale.(Tr. 260,lines 8-12)

In Golden State Bottling Company,Inc.et al v. National Labor Relations Board 414 US 168(1973) the Supreme Court of the United States set forth the requirements for determining whether Neptune-Brighton was a successor,as follows:

> "Where a new employer,such as All American, has acquired substantial assets of its predecessor and continued without interruption or substantial change,the predecessor's business operations,those employees who have been retained will understandably view their job situations as essentially unaltered..."
> (underscoring supplied)

In the instant case Neptune Brighton had not continued without interruption/or substantial change the prior operations,had not retained the former employees,and was not a"successor"

(6) The judge erred in attaching liability to Neptune Brighton when it had never been served with any legal process until several weeks prior to this hearing(Tr.1825)and constitutional requirements of due process require such service of process so that Neptune Brighton could have moved against the party that went to contract with it(Neptune-).Moreover Fed.Rule of Civ.Procedure 65(d) required the showing of actual knowledge of the unfair labor practice by Neptune-Brighton,since Neptune Brighton is not a successor as noted in "5" herein.)Page 19 of dec.,line 15)

just prior to the instant hearings.

(7) The judge erred in completely disregarding the overtime prohibition in the union contract(Dec.Page 13 lines 19 through 46) Without question,the Judge "rewrote" the union contract,though there was specific testimony that such provision was a potent provision,enforced to the union's advantage(Dec.Page 13,lines 28-33, Tr.1483.Since average production of bagels was 1000 boxes a week(Tr.1503)by testimony of the prior union president,a tremendous amount of overtime was projected and assumed by the Judge,the normal production being 100 box minimum per day,so that there was a tremendous overstatement of back pay by ignoring the overtime prohibition.Moreover,by statement of the Judge himself,the overtime prohibition was used in slack times (Tr.Page 13,lines 36-38)something the Judge himself said was the state of affairs in 1967 when he conceded the validity of the economic defenses in the hearing(Dec.page 11, lines 16-21)

In this connection,as regards the effect to be given to collective bargaining agreements,the Supreme Court has spoken as follows,in *Steelworkers & Warrior & Gulf Navigation Co*.(1960) 363 U.S. 574,

> " The collective bargaining agreement states the *rights and duties* of the parties.It is more than a contract;it is a generalized code to *govern* a myriad of cases *which the draftsman* can not anticipate... The collective agreement covers the whole employment relationship.It calls into being a new common law-the common law of a particular industry or of a particular plant. "
> (underscoring supplied)

(8) The Judge failed to reflect as additional interim earnings to be charged to JAMES GOODRICH,the sum of $1,279.00, although this additional amount was stipulated as additional earnings at the hearing,and the Judge failed to credit the appropriate Respondents accordingly(Dec. pp.26-8,Xii)

(9) The Judge failed to determine that RALPH BRIER was not available for employment in 1967 since he was financial secretary,and was not available for employment as such secretary of the union(Tr.473 and 475 of transcript) There should be no back pay award to such claimant,and the appropriate respondents should be credited accordingly(Dec.pp. 6 and App. VI)

(10) The Judge failed to record as additional earnings to non council earnings or interim earnings,for JACK OSTROFSKY, the sum of 2/12ths of $1,852.00 and 2/12th of$1375.00 said amounts being earnings of Subchapter S corporations for the periods of

November 1,1967 to October 31,1968.(Tr. 546,547,553).The total additional credits would thus be 2/12ths of 3227.00 or $536.00 arising as interim earnings from corporations such claimant owned, and the appropriate respondents should be credited accordingly. (Tr.App. 24, xxiv)

(11) The Judge erred in failing to reflect that RONALD OSTROFSKY was not eligible for employment in 1967 and 1968 since the testimony of such claimant was clear and unwavering that he went full time to school during such period,didn't call up the union delegate for employment,and after graduation went into a completely different field(Tr. 580,583,584,578).Such claimant had afull academic schedule(Tr.584). The total awarded of $3239.00 was in error,and the appropriate respondents should be credited accordingly(Tr.App. 26 XXvi)

(12) The Judge failed to reflect that LAWRENCE HOROWITZ received as additional interim earnings his earnings as a union president in 1967 of $300.00(Tr. (Resp.Exh.27, Tr.Pg.1113, lines 19-25,,page 1114,lines 1-4.The appropriate respondents should be credited. (Dec.App. 15,XV)

(13) The Judge erred in failing to determine that MURRAY BOYKIN was not eligible for any back pay award since he had taken a lease on a store prior to the lockout preparatory to starting his own business(Tr.276) and the lease was for ten (10) years(Tr.276-277) The Appropriate Respondents should be given credit (Dec.Appendix 4,iv) Moreover Murray Boykin left the union when he went into business(Tr. 281,lines 6-8) and thus was not available for employment.

(14) The Judge erred in not denying LAWRENCE SILVERMAN any backpay since he had refused to return to his former place of employment(Tr.1504,dec.pages App.15(XV)

Respectfully submitted

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BAGEL BAKERS COUNCIL OF GREATER NEW YORK
AND ITS EMPLOYER-MEMBERS

and Case No. 29-CA-387-1

BAGEL BAKERS UNION, LOCAL 338, OF THE
BAKERY AND CONFECTIONERY WORKERS
INTERNATIONAL UNION OF AMERICA

EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

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issued his Supplemental Decision [1] in the instant case, providing that various Respondents, which are or were members of the Bagel Bakers Council of Greater New York, herein called the Council, should make whole certain-named employees for discrimination in violation of the National Labor Relations Act as amended, as found by the Board in Bagel Bakers Council of Greater New York and Its Employer-Members, 174 NLRB 622 (enfd., N.L.R.B. v. Bagel Bakers Council of Greater New York and Its Employer-Members, 434 F. 2d 834 (2nd Cir. 1970), cert. den. 402 U.S. 908(1971)).

The General Counsel respectfully urges the National Labor Relations Board to adopt those findings and recommendations of the Judge to which the General Counsel takes no exceptions, as these findings and recommendations are supported by the preponderance of the credible evidence adduced at the hearing.

The General Counsel respectfully takes the following exceptions to the Supplemental Decision:

1. The Judge failed to find the following specific facts (Dec. pp 8-10): [2]

(a) Between February 1, 1967 and February 1, 1968, the Respondent-employers declined to reinstate various discriminatees when the latter so requested, except in one case where a return was conditioned on the employee's abandonment of the Union (Tr. 343, 349-50, 476-7, 722, 1155-6).

(b) The number of employees requested for each shop by the Council, in the purported reinstatement offer of February 1, 1968, were less than the complement which had worked for the Respondents prior to the lockout (Tr. 1940-2). At least certain Council members had not advised attorney Brickman how many employees they actually needed (Tr. 995).

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[1] At times referred to herein as "Dec."

[2] As used herein, "Tr." refers to the Official Transcript, "GC" refers to General Counsel's Exhibits, and "R" refers to Respondent's Exhibits.

the following discriminatees were not offered employment by their former Council employers or any other Council members, or were advised by the Union that they could return to work for any Council members: Julius Brooks (Tr. 174 Y-Z), Julius Ostrofsky (Tr. 193), Joseph Silverman (Tr. 225-6), Murray Boykin (Tr. 267, 288), Jack Todaro (Tr. 292, 300-1), Saul Sapadin (excep for reinstatement by Flatlands, which had settled with the Union outside Council auspices) (Tr. 316-8), Murray Fertel (Tr. 322-3, 327-9), Joe Martinosky (Tr. 342-3), Gerardo Russo (Tr. 349-50), Isak Jakubowicz (Tr. 390), Leon Lifshutz (Tr. 465-7), Ralph Brier (Tr. 474, 476-7), Jack Ostrofsky (except for a couple of days at Flatlands after that Respondent settled with the Union) (Tr. 569-70), Ronald Ostrofsky (Tr. 589), David Siegel (Tr. 721-3), Israel Goldenberg (Tr. 735), Seymour Ostrofsky (Tr. 742-3), Jack Sugarman (Tr. 770), Emanuel Strugatch (Tr. 776, 778), Abraham Baron (Tr. 787), Marvin Blind (Tr. 794, 801), Irving Levy (Tr. 810-2), Lawrence Horowitz (Tr. 1097, 1104, 1108-9, 1523), James Goodrich (Tr. 1155-6), Stanley Siegel (Tr. 1229, 1242-3), Samuel Provder (Tr. 1255), Eugene Moore (Tr. 1326, 1335), Arnold Newkofsky (Tr. 1815-6), and Lionel Stone (Tr. 2040-4). The record herein does not establish that specific offers of reinstatement were made by Respondents directly, or through the Union, to Sheldon Hepner or Israel Weiner (Tr. 497-8, 707-12, 1065-6; see Appendices to Backpay Specification), or to any other discriminatees named in the Specification.

(d) Discriminatee Ber Barth went to work for Jerry Lemberg and Fred Lemberg, d/b/a Culver-McDonald Bakery, which was a Council member, on February 3, 1968 (Tr. 363, 371, 374, 2109; GC-5). The Lembergs instructed him to make dough, but Barth explained he was sent in to bake, and that he could not make bagels because of his arthritis (Tr. 365-6; GC-5). The Lembergs replied they did not need a baker and not make, bagels, despite his arthritis (Tr. 365B-6). Barth noticed that bagels had already been prepared and ready for baking (GC-5). Barth went home and advised Union agent Harold Laskowitz about what had happened; Laskowitz advised that the Lembergs had told him earlier they needed a man to bake, so that Barth should return to the shop (GC-5). When Barth returned that night, he saw a young man, who was not a member of the Union, baking at the oven, and about 25 boxes of freshly baked bagels in the shop (Tr. 375; GC-5). Fred Lemberg instructed the young man to stop baking, and sent him to the retail counter (GC-5).

Fred Lemberg then asserted to Barth that Laskowitz had called him; and he added, "Who the hell does he think he is, telling me what to do; I'm the boss in this shop, and I've got orders from the association not to let anybody bake, just make, and why should I be an exception?" (Tr. 376-8; GC-5).

Barth remained in the shop for about an hour and a half, and saw Fred Lemberg baking and the young man helping him (Tr. 373; GC-5). They baked another 23 boxes (GC-5). Jerry Lemberg returned to the shop during this time, and told Barth that if he wanted to make bagels he could work, but that Barth was not going to be allowed to bake (GC-5). Barth observed both Lemberg brothers performing work (Tr. 373). Barth, after waiting around the shop, left on the advice of Laskowitz, which was obtained by telephone (GC-5).

While at the shop, Barth observed about 300 boxes of made but unbaked bagels, of which 48 boxes were baked in his presence (GC-5). Barth would have had to bake 100 boxes for his minimum daily pay, and it was clear to him that the Lembergs needed at least 100 boxes baked that evening (GC-5).

He retired in or about the end of July, 1968, from the industry, because he had to make money and was not making enough in the bagel industry (Tr. 360, 365A, 368, 370-1).

(e) Discriminatee Samuel Cutler returned in 1968 to Far Rockaway, but after a month of work he was advised while at the oven, by the employer's principal, Louis Madorsky, that there would be no work the next day and he was again locked out (Tr. 510, 523, 529-33).

(f) Discriminatee Hyman Ustin was not offered his job back with Rubinstein (Tr. 753). The Union sent him to work at Island Park, and Bagel Town, but he stopped working there because the Union sent him elsewhere, and then advised him that there was a second lockout; he never worked at Island Park again (Tr. 746-7, 753-4).

(g) The Union sent Morris Schechter back to Golden on one day, shortly after February 1, but he was sent home by Golden's president Schilowitz that day (Tr. 1078-9). Golden never offered him reinstatement thereafter, nor was he offered work by any other Council member (Tr. 1079-80). The Union never advised Schechter that Golden would take him back thereafter (Tr. 1080). Golden never requested further employees from the Union (Tr. 1716).

(h) In and after February, 1968, Tri-Boro hired Union employees to work on bagels, and its president, Meyer Cohen, baked alongside them (Tr. 1641, 1656-8, 1962). Union members found there was not enough work for them (Tr. 1642).

(i) Discriminatee Edward Haimowitz returned to Tri-Boro in the week ending February 9, 1968, and worked there until April 5, 1968, when he was advised by the boss, Jack Gorelick, that the "cooling-off" period was over, and that he should not come into work anymore (Tr. 830-3, 839-40). Haimowitz was not advised when he might return to work at Tri-Boro, and never reported there again (Tr. 833).

week ending February 8, 1968, but only a kettleman from mid-April through May, and only the kettleman and another employee from June through December, 1968 (Tr. 1837-8, 1841, 1843, R-52). The president of Neptune-Brighton, Donald Chakofsky, personally performed baking even after the return of some Union members in February (Tr. 1853).

(k) Begining February, 1968, and thereafter through 1972, even following the return of some Union members, the officers of Bagel Town, Morris Skolnick and Louis Madorsky, personally performed bagel baking at their shop (Tr. 882, 887, 988-90, 1521). Before the lockout they had rarely done this (Tr. 989-90). The Union members did not remain long, and protested the insufficient work opportunities (Tr. 886, 963).

As of February, 1968, Madorsky continued to work alongside Union members whom he employed at Island Park, and still does so to this day (Tr. 988-9). Prior to the lockout he did this only rarely (Tr. 989).

(l) Up to the time of the lockout, notwithstanding alleged drops in production, five employees worked in bagel production for Rubinstein (Tr. 1748). After the lockout began, Joseph Rubinstein, president of Rubinstein Bagels Inc., his brother Morris, and his son Stewart, began to make and bake bagels, which they had never done previously (Tr. 1731-3, 1748-50). One of the discriminatees, Napolitano (not a claimant herein), returned to work in February, 1968, but the Rubinstein family continued to engage in production of bagels, alongside Napolitano (Tr. 1740, 1750, 1951). Napolitano complained there was not enough work for him and he left Rubinstein about the beginning of April 1968 (Tr. 1741, 1751). The family, all of whom were still baking at this time, continued to perform production work after Napolitano's departure, and Rubinstein did not request any other employees from the Union (Tr. 1750-1, 1951).

back to the shop in February, 1968 (Tr. 1264-5, 1278, 1297-8). Former employees who were Union members were not sent back, and Benson claimed to have no work for them (Tr. 1300-1).

(n) In 1967, production work at Pops was performed by Sol Wolin, its President, his father-in-law and another individual (Tr. 2127, 2134-5). The Union assertedly sent in employees in February, 1968, including a baker, but they worked only until in or about the first or second week of April, 1968 (Tr. 2127-9). Wolin continued to bake even after the Union members returned, and baked almost every day from February 1 until October, 1968 (Tr. 2131-3).

2. The Judge failed to find as fact that the Council on February 1, 1967, offered reinstatement to fewer employees than had been employed prior to the discrimination against them beginning February 1, 1967 (Dec., pp. 8-10).

3. The Judge failed, on the basis of the facts asserted above, in exceptions 1 and 2, to find that the Respondent members of the Council did not, as of February 1, 1968 or at any time thereafter until October 1, 1968, make a valid offer of reinstatement to the discriminatees herein, or in fact reinstate them to their former or substantially equivalent positions of employment (Dec., pp. 8-10); and failed to provide accordingly for backpay up until October 1, 1968. 3/

4. The Judge erred in providing that monies owed to Markus Weisz should be placed in escrow, notwithstanding that counsel for Respondents stipulated that it was not necessary for Weisz to be made available at the hearing for purposes of examination, provided that copies of Weisz' relevant income tax returns be produced at hearing ; and

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3/ Exception is not being taken on the ground that the reinstatement offer was communicated through the charging party rather than to the individual discriminatees.

notwithstanding that such records were produced at hearing and were examined by said counsel (Dec., p. 29; see Tr. 2047-9, 2145).

5. The Judge failed to add $1279 to the sum of 1967 Non-Council, or interim earnings, for James Goodrich, although this additional amount was stipulated to at the hearing; and to credit the appropriate Respondents accordingly (Dec., pp. 26-8, xii).

6. The Judge erred in finding that there was a fundamental change in the bagel industry beginning in 1966 which did have a substantial effect on the work available in each of Respondents' bakeries in 1967 (Dec., p. 11).

Respectfully submitted,

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PETITION FOR REVIEW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-------------------------X

BAGEL BAKERS COUNCIL OF GREATER NEW YORK, BAGEL BOX,INC., BAGEL TOWN,INC., BENSON BAGEL BAKERY,INC., CULVER BAGEL BAKERY,INC., FAR ROCKAWAY BAGEL BAKERY,INC., GOLDEN BAGEL BAKERY,INC., ISLAND PARK NASSAU BAGEL BAKERY,INC., NELSON BAGEL BAKERY,INC., NPETUNE BRIGHTON BAGELS,INC.,RUBINSTEIN BAGELS,INC., RUBINSTEIN BAGELS,INC., TRI-BORO BAGEL CO.INC, D & H BAGEL BAKERY,INC., AND POP'S BAGEL BAKERY,INC.,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent

CASE #
29-CA-887-1

-------------------------X

The above named petitioners hereby petition the Court for review of so much of the Order of the National Labor Relations Board entered on October 28,1976 which adopted the recommended order of the Administrative Law Judge,as modified by the Board, as:

(1) Granted the parties designated as discriminatees holiday and vacation pay,and allowed the National Labor Relations Board to amend the back pay specifications for such holiday and vacation pay,and allowed the amendment without adjournment of the hearings.

(2) Granted the parties designated as discriminatees holiday and vacation pay based upon a "per-box" formula,rather than on the basis of $2.50 and $3.50 per day previously paid by other employers during the back pay period alleged.

(3) Failed to reduce the back pay claimed by a 60-65% reduction in business volume andpayroll volume ascertained as the actual loss in volume by the administrative Judge,during the back pay period.

(4) Failed to reduce the back pay amount by a 60-65% reduction in sales and payroll volume which took place during the back pay period.

(5) Granted back pay based upon actual 1966 volume when 1967 volume was only 35-40% of the 1966 volume,and payroll projected through the back pay period ascertained was only 35-40% of the amount found by the Board in its finding.

(6) Directed petitioners to pay to the discriminatees wages based upon .28 per box of bagels produced when in fact the prevailing union contracts in effect during the back pay period provided for .26 a box payments.

(7) Awarded back pay to the claimants against Neptune-Brighton Bagels,Inc. notwithstanding the fact that such petitioner was not a party to the proceeding until the back pay specifications,and was never served with legal process in this proceeding,and said Neptune-Brighton Bagels,Inc. was not a successor entity.

(8) Granted back pay awards based upon the concept that the petitioners would have provided all of the employment that the claimants could have found in the bagel industry during the back pay period found by the Board,without giving credit to the petitioners for other employment that the discriminatees would have found.

(9) Denied due process to the petitioners during the course of the back pay hearings.

(10) awarded any amount at all as back pay to the discriminatees when no back pay wasdue to the discriminatees.

(11) failed to credit petitioners for employment earnings of the discriminatees during the back pay period,and failed to credit petitioners for school attendance by the discriminatees during the back pay period.

Yours,etc.

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EXCERPTS FROM TRANSCRIPT OF TESTIMONY

BEFORE THE NATIONAL LABOR RELATIONS BOARD

29th Region

- -x

In the Matter of:

BAGEL BAKERS COUNCIL OF GREATER NEW YORK AND ITS EMPLOYER-MEMBERS

and

BAGEL BAKERS UNION LOCAL 338 OF THE BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA

Docket No.
29-CA-887-1

- -x

16 Court Street,
Brooklyn, New York
Tuesday, July 20, 1976

The above-entitled matter came on for further hearing, pursuant to adjournment, at 9:50 o'clock, a.m.

BEFORE:

JAMES ROSE, Administrative Law Judge

APPEARANCES:

STEPHEN E. APPELL, Esq.	Brooklyn, New York, appearing on behalf of the Counsel for the General Counsel.
MYRON W. SISKIN, P.C.	855 Avenue of the Americas, New York, New York
and PHILIP LEVINE, Esq.	16 Court Street, Brooklyn, New York, appearing on behalf of Respondents except Flatlands Bagel Bakery, Inc., Laurelton Bagel Bakery, Inc. and Neptune Bagels, Inc.

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APPEARANCES (Continued):

STANLEY BRYER, Esq. and DAVID KRAMER, Esq.	200 East 42nd Street, New York, New York Law firm of Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 1140 Avenue of the Americas, New York, New York, appearing on behalf of Oscar Stern.
HARRIET LEWIS	8101 Flatlands Avenue, Brooklyn, New York 11236, Secretary-Treasurer, Flatlands Bagel Bakery, Inc.

Obviously it is the basis upon which we are proceeding here today.

MR. LEVINE: All right, excuse me. I mean, you submitted a number of papers in evidence yesterday.

MR. APPELL: Your Honor, the board decision, including the trial examiner's decision is in evidence.

JUDGE ROSE: All right.

MR. LEVINE: Part of your Exhibit A.

MR. APPELL: Exhibit 1.

MR. LEVINE: I see.

Q Mr. Levy, what is the basis of the termination of liability for Culver Bagel Bakery as being June 21, 1967?

A As stated in the back pay specification the liability of Culver Bagel Bakery was terminated as of June 1, 1967 pursuant to the decision and order of the board as set forth in Footnote 1 of the board's decision.

Q With respect to Roman Numeral Two, computation of gross back pay, can you explain why the calendar year 1966 was used in the computation of gross back pay? Why this year was used as a base year.

A It is the year immediately preceding the unfair labor practices found by the board and the courts.

It is the year immediately preceding the lockout of February 1, 1967 and the other unfair labor practices immediately antedating that lockout and I believe it is a year presumably free of unfair labor practices and, prima facie, a reasonable period and basis from which to project into the back pay period what the employees involved would have earned, absent the discrimination against them as found by the board and courts.

MR. SISKIN: Objection. I am going to move to strike all of that portion of the testimony after the testimony of Mr. Levy with respect to the sole question as to why he selected the year, it is the year and any testimony I move to strike beyond those words which indicate it was the year immediately preceding the unfair labor practice.

I think all the rest is not responsive to the question.

JUDGE ROSE: Overruled.

Q Now, why were the earnings of both Council members and noncouncil members taken into account?

A Well, to answer that question I will have to refer to the prevailing practice in this New York bagel baking industry with respect to the higher unemployment of bagel bakers.

The industry, as it existed during the pertinent years, consisted of a number of employers of bagel bakers represented by Bagel Bakers Union Local 338.

Some of these employers were at the time banded together in the employer association, the Bagel Bakers Council of Greater New York who are the respondents in this proceeding, and an equal or greater number of employers were not members of this particular council.

The employees earned their living by working interchangeably or indiscriminately for employers who are members of the Council and employers who were not members of the council.

This appears very clearly, I think, in the various indices which show the earnings of the various claims in the years 1966, '67 and '68.

In any given week, month, quarter or year any one of the employees or claimants involved in this proceeding could and in fact did for the most part work for several different employers, some of whom were members of the council, others werenot.

From the point of view of the employee, his annual income derived from work with a multiplicity of employers and in order to make any or arrive at any meaningful computation of their earnings it was necessary to take into account the earnings of both Council and non-Council members.

Q With respect to Paragraph 3 of Roman Numeral Two, the appropriate method for allocating the loss in wages, can you explain to the court exactly how you arrived at this method and the reasons for the method?

A Well, I think that can be best explained by illustration from the appendices.

I think the first one, Appendix 1 for Abraham Baron will do as well as any other.

The process of computing ultimately the net back pay alleged to be due to any individual was essentially this:

First, a determination was made as to what the individual claimant earned in the year 1966.

This information appears on Appendix 1 and comparable appendices for other claimants.

Appendix 1 in the case of Baron shows the money that he earned from council members in 1966 and the amount he earned from non-council members in 1966.

Those two figures are totaled to provide the grand total for the year 1966 representing the total income of a particular individual from employment in the New York bagel baking industry in the year 1966.

The same process is repeated for the year 1967 and for the first nine months of 1967 --

JUDGE ROSE: '68?

MR. APPELL: '68.

Q The first nine months of '68?

A Yes, excuse me. So we have the figures for the years 1966, 1967 and the first nine months of 1968 what the individual earned from council members, what he earned from non-council members and the first binding totals for each year or the nine months of 1968.

These totals are then transferred to Appendix B. The income for the year 1967 is subtracted from the income for the year 1968 and this provides a statement of the loss for net back pay due the year 1967.

Similarly, for the year 1968, the actual 1968 income for the first nine months of that year is subtracted from a pro rata share, that is to say, 75 percent of the 1966 income to determine the loss or net back pay suffered in the first nine months of 1968.

The figures for loss or not back pay thus computed on the Appendix B are posted or transferred to Appendix C.

The purpose of Appendix C is to allocate or distribute the total losses recorded, computed and recorded for the years 1967 and 1968 to those respondents who were the employers of the particular claimant in the base period, 1968 and to allocate --

Q 1968?

A 1966, I'm sorry.

The purpose of Appendix C is to allocate the losses of 6 percent, computed on a quarterly basis, an annual basis?

A Well, it is at the rate of 6 percent per annum, taking into account the period of time that has elapsed from the unfair labor practices involved to the present time.

It is not a precise figure, but I think it is close enough to provide any and everybody who is concerned with the dollars and cents aspects of this case to know what it is.

Q By the way, the method of using a year immediately preceding a year of unfair labor practices for the computation of a gross back pay period, is this a common method used by the NLRB?

A I think it is a frequent method used and --

MR. SISKIN: Objection.

MR. APPELL: I believe the answer is responsive to the question.

The question was is this a common method and the answer was it is a frequent method.

JUDGE ROSE: Overruled, proceed.

A (Continuing) It is a common or frequent method used. The length of the base period in any given case can vary from 13 weeks period to a year, maybe longer.

I selected a year in this case in order to take into account and have the base period reflect the fact that all quarters of the year in this industry are not identical.

Some quarters are busier than others.

There is a slower season, I believe, in the summer period when employment and earnings tend to fall off somewhat, and I think it would not have been equitable or fair to the respondents and all others concerned if a lesser period of time had been used.

Q Did you make any allowances for any alleged claimant problems on employment amongst the respondents during the back pay period?

A This computation per se does not make any such allowance.

Q Can you explain why that is so?

A The premise or foundation of the gross back pay computation is a projection shown into the back pay period of the earnings of the various claimants during the year 1966.

I am aware of the fact that the respondents herein have advanced various contentions that events subsequent to 1966 should have been taken into account.

By and large the representations have been somewhat general in character.

They have been countered or contested by the union or the charging union and the --

MR. SISKIN: Objection. I am going to move to strike this.

The question was limited solely to a different subject than Mr. Levy is testifying to now.

Do you want to repeat the question, please?

JUDGE ROSE: No, no, I remember the question.

Mr. Appell, this will not be very helpful for me to try to decide this case or the board or the Circuit Court.

Mr. Levy's understanding of what may or may not be somebody's contention and whether or not somebody else contested that contention is just simply not helpful.

Just ask him, Mr. Appell, if he took into consideration these factors and if he did he did and on what basis.

If he did he didn't.

MR. APPELL: I believe he already answered he didn't and I'm asking for the basis of not having included it.

JUDGE ROSE: What difference does it make?

Q Mr. Levy, were there any discriminatees for whom you found that interim earnings exceeded the gross back pay of the 1966 year?

A Yes, I foundthat to be true in about 15 cases of persons who responded to our compliance inquiries and

It is going to compound hearsay.

JUDGE ROSE: Mr. Appell?

MR. APPELL: I am trying to ascertain the basis for the allegations in the back pay specifications.

JUDGE ROSE: Are you trying to prove there is a successorship through this witness?

MR. APPELL: Not necessarily, just to give the background as to why this document reads the way it does.

JUDGE ROSE: Isn't it self-explanatory? I will sustain the objection.

MR. APPELL: I have no further questions.

JUDGE ROSE: Cross-examination?

CROSS EXAMINATION

Q (By Mr. Siskin) Mr. Levy, can you tell me why you have an overlap period involved in this?

In further amplification of that question, isn't it true that the discrimination period started with February 1, 1967 and yet you have got a January, 1967 total reflected in your 1967 earnings?

A I think what you are referring to is the 1967 Council number earnings including income from January, 1967; is that what you have in mind?

Q That is a later line of questioning, but the immediate question --

A I'm not clear as to the exact meaning of your particular case.

You can have projections, instead of projections of the individual employee involved you might have projections of so-called representative or comparable employees.

You might have the earnings of identifiable replacement employees.

You might have some sort of calculation based on the earnings of incumbent employees during a back pay period to select the formula most appropriate to any given situation, given case involving some examination and analysis of the facts and data and some exercise of judgment in that context.

Q Mr. Levy, you did not consider post unfair labor practice volume or business conditions at all in your determination; is that a fair statement?

A That is a fair statement.

Q Isn't it a fact and isn't it fair to say that in a normal situation the NLRB does consider post lockout events and volume, business conditions of the employer?

A Well, it is certainly a fair situation to say in certain cases those factors are considered, yes.

Q And isn't it also fair to say that if there are slack periods it is the normal thing for the NLRB to take into account slack periods in computing back pay?

A Yes, they are taken into consideration in one way -- there's various ways of doing it.

Q Does the NLRB also take into account financial ability of the employers to pay any projected back pay earnings during the period in question?

A If I understand your question correctly I would answer no.

Q What I intend to convey is does the NLRB consider the financial perspective of the company or companies that are involved in considering whether the companies could have actually in fact paid out the earnings that they may determine as being projectable as back pay awards?

In other words, do they take into account the financial structure of the company, the solvency of a company in determining whether during the back pay period management could in fact have paid out those wages?

I will rephrase it again if you would like.

A Would is the term in this financial solvency, I mean --

Q If I was to, hypothetically speaking, project to you a company, one for example, any one of the companies that might be involved in this proceeding, as being in dire financial condition on the unfair labor practice date so that payment of any back pay award as projected by the NLRB would in fact have been impossible based upon the financial condition of the company, would this be a factor in any particular set of facts to the NLRB to consider and take into account the back pay award?

A Well, if I understandyour question correctly the answer would be no.

Q What do you understand the question to be?

A I understand the question to be whether in computing or calculating the back pay did you in consequence of some preceding unfair labor practice we would take into account whetheror not the respondent is in fact able to pay the end result of that computation.

Q Not at the point of the computation but the precise nature of my question is during the back pay period in which the specifications are involved, that is to say, in '67 and '68, if you were able to mirror the financial status of the company, would it be important for you to determine whether it could have in fact paid out the wages that you determined could have been paid?

Would it be relevant to you to see whether in fact the company was in a financial bind or financial capability of paying those?

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A I think not.

Again you asked me what I take into account, the financial ability of the company in 1967 to do what?

Q To pay on a weekly rate pro rata the payroll figures indicated by your back pay specification.

A The way you are putting the question to me I will have to answer it no.

I don't want to quibble with you about words. I'm having trouble with your question.

I think I know what you are getting at.

Q Can you envisage, can you project a situation where the NLRB would consider as a matter of policy a determination of whether management could have afforded to pay based upon its financial position, the amounts determined as being due to the claimant during the back pay period.

A Can you read the question back to me?

MR. SISKIN: Maybe the question is bad.

JUDGE ROSE: Just a minute, Mr. Levy.

You know, I don't know how much we have to go over on all of this really, Mr. Siskin.

As I understand the import of your question it is if for instance you can demonstrate that one of these companies was bankrupt or going bankrupt or business was reduced by half --

MR. SISKIN: That is right.

JUDGE ROSE: Therefore but for any discrimination they would only have had half as many employees.

MR. SISKIN: Correct.

JUDGE ROSE: Well, that is a factor that is taken into consideration as he has already answered.

You are asking whether their financial condition now is considered with regard to being able to pay liability.

MR. SISKIN: Not the last half of that is not my question.

JUDGE ROSE: I think we can go on to another point after lunch.

We will be in recess until 1:30.

(Whereupon and at 12:20 o'clock p.m. a luncheon recess was taken until 1:30 o'clock p.m.)

AFTERNOON SESSION

JUDGE ROSE: On the record.

Q (By Mr. Siskin) In the course of your determinations, either the initial one back in '74 or the one that was most recently arrived at, did you consider in any way the volume or sales volume of any other respondents herein?

Just yes or no.

A Yes, it was considered.

Q Did you compensate for any of it in your factors?

A No.

Q Did you ask the employer respondents to contribute any of their financial statements as of the years under consideration?

A Yes.

Q Did you see any of those financial statements or balance sheets or income statements, whatever?

A Yes.

Q Do you remember which of the employers you ever saw the financials?

A Well, not specifically, but quite, I think the majority, most -- at least the majority.

Q For which years, do you recall? '66, '67, '68? Which of those years or all of them?

A I think we asked for records for all three years, and I believe they were produced except in some specific case where they had been lost, misplaced, and for some reason not available.

Q Employers I said. I want to make sure of that.

A Yes.

Q Do you recall what those records revealed with respect to the financial operations? Did they show losses for '67 and '68?

A I don't know whether they showed financial losses. They showed -- one of the things the employers were interested in putting forward and which I think the records tended to show as a reduction in the consumption and purchase and use of flour which is the principal ingredient of bagels, and it is probably fair to say although I can't recall specific digures, that they showed certainly to some extent reduction in sales during the back pay period as compared with the base 1966 period.

Q Would it be fair to say there were very sharp reductions?

A Well, they were substantial. I don't want to quibble with you but they weren't, you know, considerable.

Q Do you recall at the present time without refreshing your recollection by looking at any documents whether they were in the neighborhood of 70 or 80 percent reductions?

A Oh, I don't believe, my recollection is no, they were not that huge. I could be wrong but that is my best recollection.

Q And is it fair to say that you did not consider any of the flour purchase reductions in your dollar determinations herein?

You didn't compensate for them; is that correct?

A Well, to answer the second half of your question, I did not compensate them, it is not fair to say I didn't consider them.

Q No adjustment was made for the decrease in volume of operations or of flour purchases; is that correct, Mr. Levy?

A Correct.

Q The base year 1966, the historical year, '66, that included overtime, did it not?

A Yes, certainly.

Q Is it fair to say that if the base year included overtime in your computation the years 1967 and 1968, projected years must necessarily have included overtime?

A It is correct.

Q Is the policy of the NLRB to consider union contracts in their determination of back pay?

A Insofar as it is relevant we try to consider everything that is relevant.

Q Did you analyze the union contract before you came to this determination of back pay?

Were you familiar with the union contract provisions?

A Well, yes.

MR. APPELL: Your Honor, may we ascertain which union contract?

Q The union contract in force at the inception of the within proceeding.

A Generally familiar with it.

Q Did you know there was a clause which forbade overtime in the union contract; just yes or no.

A No.

Q Were you aware that the union contract contained for that period of time the following clause:

"No employee shall be required or permitted to work overtime" just yes or no.

A I can't really answer it yes or no. I would have to say if I read it and was aware of it I attached no particular significance to it.

I don't want to give the impression that I never consulted or referred to it but if I did it had no -- in the context of the preparation of the back pay specification, it had and I attach no significance to it.

That is why I can't give you a simple yes or no answer.

Q Did you know the production norms and standards which were reflected in the union contract?

A Yes. You are referring to the --

Q Production levels.

A So many boxes per day to constitute, to represent day's work? So many dozens per box for 166 or something.

Q Do you know --

MR. APPELL: Could the witness finish.

JUDGE ROSE: Yes, Mr. Siskin.

MR. SISKIN: I apologize.

JUDGE ROSE: Have you finished?

THE WITNESS: Yes.

Q Did you know at the time you made this specification what the straight pay, gross pay would have amounted to for the claimants in the within proceeding during the base year and during the projected years?

A I don't understand that question, Mr. Siskin.

Q Did you know when you prepared the specifications what the straight pay total would have amounted to for the claimants on a weekly basis?

A You mean if they had just been paid the 28 or so?

Q Straight pay.

A Dollars per day times five days or six days?

Q Wasn't it four days, Mr. Levy?

A I don't recall.

Q Wasn't that the union contract, four days a week?

A I don't recall.

Q Do your records reveal whether you used any four day norm or a five day norm?

A Well, I can tell you I did not use any four day or five day norm.

Q If you were to use four days do you recall what the normal rate per day would have been on a straight pay basis?

A I recall it as being $28 and change per day and times four would be --

Q $112?

A Yes.

Q If you multiplied 112 by I guess it was 50 weeks, would it be fair to say in the ordinary sense that would be the straight pay portion of everybody's wages as far as the claimants are concerned, whatever that total would be?

A It follows that mathematically.

Q Is it also not true that there were two levels of employment within the union, kettleman I guess they are called and a second tier?

A Yes.

Q Is it also true? I want you to answer on that.

A Yes.

Q Is it also true the kettleman was a lower pay --

A Correct.

Q Do you recall what the kettleman rates of pay would be?

A I don't really recall. It is in the contract. It is $1 or $2 a day less or some flat rate. I don't really recall.

Q Does it ring a bell 19 versus 28?

A It is possible. I was not particularly concerned.

Q Mr. Levy, when you projected the earnings did you compensate for the fact that some of the kettlemen became bakers?

A No, I did not.

Q So that when you projected your earnings you ignored the distinction between kettlemen and bakers, isn't that correct, no adjustment was made for that fact, either positive, either reduction or increase?

A Yes, yes.

Q No reduction, no adjustment was made for that?

A Yes, correct.

Q Now, going back to the projected period in 1968 if in fact the correct date upon which the back pay period were told were in fact January 26th or February 1, what would have been your formula to determine the amount of back pay?

Would it in effect have been only one month so to speak of the year 1968?

A In effect, if this was the controlling premise then I would have had to cut back pay off as of February

1, '68 instead of October 1, '68, and whatever back pays accrued in this specification between February and October would have to be out.

Q In effect it would have been so to speak --

A -- shortly by --

Q (Continuing) eight months, give or take a few days?

A Yes, that is correct.

Q So that for that year only one-ninth in effect of the back pay specifications for 1968 would have been correct if in fact --

A That is correct.

Q (Continuing) If in fact --

A Yes.

Q (Continuing) Feburary 1 were to be deemed correct?

A Assuming your premise the arithmetic follows.

Q Now, did there come a time when you ever compensated in any way by adjustment of any of the factors of overtime, of kettlemen versus bakers, volume, contribution of the business, et cetera, any of the factors I have been discussing here or asked you about?

Did there ever come a time when you compensated for them by adjustment, positive or negative of these numbers?

A No,sir.

Q Nowhere in these figures was slack pay adjusted for either; isn't that also true?

A That question I don't understand. What do you mean by slack pay?

Q There was no adjustment here for slack pay by the vicissitudes of working conditions, industrywide conditions, et cetera?

They were not compensated at all in your projections in any way, positive or negative dollar numbers from your adjustment that you arrived at by the cold arithmetic of adjustment, '66, '67 and '68?

A As I said many times I projected '66 into '67 and '68, period.

Q Now,with respect to Neptune Brighton Bagels, I want to ask you two or three questions on that.

When did you first ascertain that in your opinion Neptune Brighton Bagels was the successor to Neptune Bagel Bakers?

A I don't think I can pinpoint that to any particular date. That was a kind of running problem.

I was aware at a very very early date of this transaction, and prior to the preparation and issuance of this backpay computation, in consultation with members of the legal staff of the region we concluded that

Neptune Brighton Bagels was in a position of a successor to Neptune Bagel Bakers Inc., and so stated or alleged in this back pay specification.

Q Can you fix a period of time, approximately?

A Well, I don't know.

Q Was it in the year 1975?

A I don't know, no. I would say 1975 was still an open question just how we would proceed with respect to Neptune Brighton Bagels.

I would say we didn't come down with a firm decision until sometime in 1976.

Q Did you ever notify Neptune Brighton Bagels Inc. that you intended to make a claim to that corporation before 1976?

A I am pretty sure not.

Q Can you tell us when in 1976 you notified Neptune Brighton Bagel [illegible] at your agency had deemed Neptune to be successors?

A I think the first notice of communication would be this back pay specification.

Q 45 days ago, right?

A Yes, whenever it issued.

Q Had they ever been served with any process prior to this?

MR. APPELL: Objection as irrelevant.

JUDGE ROSE: Well, I don't see how this witness could possibly answer.

MR. SISKIN: Well, he is the one person in administrative that is most familiar with this file, I believe.

THE WITNESS: I'm sorry, am I supposed to answer?

JUDGE ROSE: I thought I sustained the objection.

MR. SISKIN: I'm sorry.

Q Had you ever notified administratively or otherwise Neptune Brighton Bagels of any claims of the NLRB with respect to back pay prior to this date in 1976, this most recent date?

Had your agency ever or had you administratively ever sent notices to this corporation?

A I am quite sure I did not send any such communication.

I wouldn't speak for the agency.

Q Now, did there ever come a time when you advised the employer respondents that Respondent's 1 and 2 were to be succeeded by any other claims for back pay?

A What do you mean by Respondent's 1 and 2?

Q Well, that is the exhibit dealing with that earlier projection.

A Oh, excuse me.

Q It is my fault.

A I lost sense. Would you just repeat the question?

Q Surely, did there ever come a time when you notified the respondents that there had been a revision in the claims of the NLRB with respect to back pay?

A Well yes, there came a time when I notified their attorney, Mr. Levine.

Q When was that?

A I don't recall exactly but it must have been either late -- I'm just guessing now, late '75 or '76.

I provided him with a chart similar to the one that you introduced I think as Respondent's No. 2, somewhat in the same form.

I don't recall the exact date when I provided him with that.

There was also more or less simultaneously with that communication Mr. Levine's letters to -- those were letters to respondents who were at the time not represented by Mr. Levine.

I believe again that was in 1976.

Q Just for purposes of clarification, I have another photocopy of that earlier sheet.

Is this the same as the exhibit we showed you before?

I have to ask you certain questions.

A Yes, this is the 1974 schedule.

Q Just we are having copies made of that and I don't have it in front of me now.

This schedule reflecting $108,000 included other corporations that are not parties to the within proceeding at the present moment or that are represented by the Council; is that correct?

A Well, I don't know how to answer your question. The names of the firms are set out at the top of the column. There looks like 13 or 14, 15 companies.

They are all respondents in this proceeding. Some of them were not represented by Mr. Levine at the time. Does that answer your question?

Q Were additional corporations included in the subsequent list which formed part of the specifications, additional corporations were submitted, isn't that correct, to this list at the time the final specs came down?

A Well, additional claims were submitted, as you pointed out, amounting to roughly twice the figures here.

Now, as to whether the back pay specification includes additional corporations I doubt that, but you want me to check these?

Q You can find that later. That is not necessary.

Now, in your projection to 1967 and '68 did you compensate or adjust for any conversion to machine production from hand production in the industry?

A No, I did not.

Q Were you aware of same?

A I was aware in a very general way of allegations and counter-allegations.

Q Do you know whether in fact there had been any significant conversion into machine production for the years '67 and '68?

A I don't know independently of my own knowledge.

Q If it was established to you that there had been a conversion would your figures be reduced?

A It is a possibility. It is not a necessary consequence of the proposition.

Q Well, this was a handcraft union, was it not?

A So it has been referred to, yes.

Q If in fact a significant part of the market for handcraft bagels had been decreased wouldn't that have affected your computations, shouldn't that have affected your computations?

A Perhaps but not necessarily.

Did you want me to elaborate on that?

Q No.

Well, if in fact handcraft market conditions were such that there would have been no work or substantially decreased work available, shouldn't that have played a part in your computations, just yes or no?

MR. APPELL: Your Honor, I object to the question to the extent that it says yes or no.

The witness already indicated that it might be or might not be.

JUDGE ROSE: Sustained. Just answer the question the best you can, Mr. Levy.

A The effect I would recently have to accord to technological changes in the industry affecting the demand for labor on the employer's side and the productivity of labor as a result of these technological changes would necessarily have to be affected by the nature of the changes themselves, and in other circumstances which were not affected by continuing unfair labor practices would be affected by the arrangements that the parties, the collective bargaining agent and the employer arrived at to deal with these technological changes and the impact of them.

The technological changes don't lead automoatically or irrevocably to only one rearrangement of the labor force.

It can lead to a multitude of different resolutions, depending on how the parties to the collective bargaining resolved them.

Q Did you have any basis in fact for eliminating technological improvements as a factor in evaluating the back pay?

A You know, yes, the basis was several premises on which the entire back pay specification is founded, to wit, that unfair labor practices continued until the September, 1968 contract, that the nature, volume, impact, effect of whatever the economic and technological changes took place were the subject of dispute and controversy between the contending parties, and that collective bargaining be operative at the unfair labor practices from the ward of the courts, not disrupting the normal relationships and that various sorts of solutions were open to the parties which could produce all sorts of results which I did not and do not feel at liberty to speculate about.

Q Well, if in fact you knew that there had been technological improvments of significant dimensions wouldn't that necessarily have meant that of the total market available to producers a significant part would have gone away to those companies that had been most efficient?

Isn't that the premises that industry operates on?

A Well, if you stated the abstract I would have to agree with you.

I have tried to deal with the concrete problem before me of the New York Bagel Baking Industry in this particular period and not hypotheticals and economic abstractions.

Q Do you know what point in time, of your own knowledge, that this technological improvement began to take hold?

A Not really.

Q Did you know what percentage of the market this machine production had as of September 30, 1968, for example?

A No.

Q Did you know what percentage of the market it had on January 31, 1968?

A No.

Q Or for that matter, January 31st or February 1, 1967 did you know what percentage it had?

A No.

Q Did you know whether it increased as a matter of -- relatively whether it increased from February 1, 1967 until September 30, 1968?

A Of my own knowledge, no.

Q Now, did you consider competition in your computation of back pay amounts?

A Well yes, I considered it but for the reasons I previously stated we rejected it.

Q And you did not compensate for competition?

A Not compensated in the back pay specification for competition.

Q Did you know how many bagels shops were in the industry on February 1, 1967?

A No, sir.

Q Did you know how many bagel shops there were in the industry in this area affected by this proceeding on September 30, 1968?

A No, sir.

Q Or on January 31st or February 1, 1968?

A No, sir.

Q If in fact competition had been 100 percent more in your mind would it have been proper to make an adjustment for competition?

A Not in the terms that you put it, Mr. Siskin.

I never made adjustments for compensation as such.

In appropriate cases where continuing unfair labor practices have not been present, I have made compensation as you say for changes in levels of employment by employers during the back pay period, as long as they were attributable to any non-discriminatory factor, be it technology, competition or anything else.

Q With respect to competition did you have available to you when you were making your determination the names and addresses of any additional bagel shops that came into existence during the back pay period?

A I was aware that there were other bagel shops in the area that weren't in existence in February, February 1, '67.

Q Did you know then when you made these computations as to whether any members of the families of the claimants were principals in any of these shops?

A Well, I'm aware of the fact that some of the claimants went into business for themselves.

Does that answer your question?

Q Yes.

Do you know the names of those claimants?

A Well, I don't know whether I can recite them offhand.

Q Those that you know now.

A I know that -- this is not necessarily exclusive, this is just what comes to mind when I look down this list.

Joseph Silverman had a bagel shop in Bellmore. I think he is out of that business now.

Q What period of time was this, by the way as to each of those? I would appreciate it if you could name the years.

A I couldn't do that off the top of my head.

Q Do your records reveal those?

A I would think so.

Q Did you refer to them when you made these computations?

A Yes, insofar as the pertinent -- at least insofar as I judge them to be pertinent that is reflected in the various appendices.

Q I just wanted the names of those self-employment shops.

A Lawrence Horowitz. Again at some point he has been in business for himself.

I think currently he is.

Edward Haimowitz. Yes, he is connected with Galaxy --

Q I just --

A Edward Haimowitz.

Q I want your remarks limited to that period of time in '67 and '68.

Just during this period of time, I think that is what we are talking about, the relevancy of those employees who were self-employed.

A Well, offhand at the moment I'm not positive about the dates for Lawrence Horowitz.

I don't recall whether his self-employment is in whole or in part during the back pay period or subsequent to it.

Sugarman I recall distinctly has self-employment during the back pay period.

Edward Haimowitz I'm pretty sure has at least a small amount of self-employment during the back pay period.

David Seigel I think has some self-employment during the back pay period.

Morris Minton, I don't remember whether he was self-employed or not.

Harold Nukofsky I'm pretty sure has some self-employment in the back pay period.

Jack Ostrofsky had self-employment during the back pay period.

Ronald -- strike that.

Q Did your files reveal at the time you made these specifications the actual times, duration of periods represented by those self-employed individuals?

In other words, during that back pay period would your records reveal at the time you made these specifications, would they have revealed the periods of time they were self-employed?

A Well, that might vary with the individual, meaning by that I would have or in fact did have different amounts or pieces of information about different individuals. Does that answer your question?

Q Not really, but I will go further.

If you were to look at your records now would you have schedules or data reflecting when those individuals were self-employed during the back pay periods?

A Well, in some or many cases I can't say without actually looking at the records.

Q Will those records be before us?

A Well, whatever records -- well, I guess that would depend on the form in which the record is.

I will have to be guided by counsel in that.

Q With respect to those self-employed individuals, did you ask those self-employed individuals who, who incidentally, are claimants, for their company's payroll records?

A For their company's records? No.

Q Well, wouldn't that have been pertinent with respect to the concept of availability for employment?

A I don't get the connection.

Q If an individual is self-employed he would naturally have an interest in furtherance of that employer relationship insofar as he was a principal; isn't that correct? Self-motivation profit for that company.

A Yes.

Q I would assume he would spend some time with that company; isn't that correct?

A Yes.

Q Did you make inquiry with respect to those individuals as to whether they had a payroll book, for example which would reflect the hours spent by the employees during the period of time?

A By those particular claimants?

Q By those particular individuals, yes.

A No, I did not do that.

Q Well, insofar as they were claimants wouldn't they naturally be self-interested in furthering their own claims? Doesn't it follow as we all are?

A Well, I don't know about that, Mr. Siskin, that there are a lot of premises behind that question, one of which I think is that the individual claimants were the moving parties in this back pay proceeding which I don't think is quite the fact.

Q Did you or to the best of your knowledge did you or your agency make any effort to audit or examine the records of those individuals who were self-employed?

A No,sir.

Q Did you request that their records be produced?

A Their business and acconting records?

Q Yes.

A No, with the exception that I have recently requested corporate returns as distinguished from individual returns and on the basis of that we will make such adjustments in some of these figures.

Q Are those downward adjustments?

A Yes, yes.

Q Can you tell me which are the adjustments that you make in those figures?

A We are going to make some adjustment in the case of James Goodrich who I didn't get a chance to mention in my original recital.

He appears under Triboro Bagel Company.

Well, he may appear in other places, I'm sorry. Just how the adjustment --

Q Give or take a few dollars do you know what the amounts are?

A Somewhere in the neighborhood of $1,000, $1,000 or $1100.

Q Just for him alone?

A Yes, for Goodrich.

Q How about any otherindividuals?

A We have some further information about the owners or partners, I use these terms loosely.

We are dealing with corporations.

Q I understand.

A I refer to them as employers or self-employed or partners.

The principals in the Jad and Day Bakeries will have some adjustments made. I simply haven't had the time to.

Q Would they be substantial, relatively speaking, over $1,000?

A I think from what I have seen so far it will, oddly enough, differ among the partners, but in one case I am pretty sure it is going to be in excess of $1,000.

Q So you are talking roughly, give or take, a few dollars, just off the top of your head, $2,000, $3,000, $4,000, something like that?

A Something like that, yes.

Q Mr. Levy, if in fact your investigation showed up that there were errors in these specifications because you did not have all the data available to you, wouldn't that normally be a red flag to you with respect to some of the other claims?

MR. APPELL: Objection, calls for a speculative answer.

MR. SISKIN: It is cross-examination, your Honor.

JUDGE ROSE: We are in a fairly speculative area.

MR. APPELL: I am aware of that, your Honor, but even this --

JUDGE ROSE: The specification is based on this witness' judgment basically so I think the question is pertinent, overruled.

A Well, in answer to your question, Mr. Siskin, I will have to take exception to your use of the term errors.

Q I said red flag.

A Or red flag. You know that there were -- I think you used the term errors in the computations. These statements and figures in the back pay specifications as to the interim earnings of the various individuals are simply admissions, nondisputed figures offered up by the NLRB on the basis of the investigation that we conducted.

They are not issued with any warranty or guaranty that there may not be more. We offer these interim earnings as admissions which I think we reduce the burden on the respondent but I have never understood it to be the function and responsibility of the general counsel in a proceeding of this sort to guarantee that there are no other interim earnings.

We do the best we can with our resources, not only up to the time of issuance of the back pay specification but thereafter as other information may come to our attention.

Q But --

A So I make no claim or representation that this exhausts all possible interim earnings or income of any of the claimants.

Q Well, wouldn't it be fair to say though that if anyone had documentation from the standpoint of employment record, wouldn't it be those employees who had their own shops, who subsequently had their own shops?

Weren't they in command of their records so that they could give them to you?

A I presume they are in command and possession of all payroll business and accounting records relating to their own enterprises.

Q Did you ask them to bring any payroll records from their shops?

A No, I had no reason to.

Q Isn't it a policy of the NLRB that availability for work is a consideration for determining back pay?

A Yes.

Q And if a person was in fact working at his own shop wouldn't that be a factor in a given day or a week or a month or a year in arriving at the amount of back pay specification?

A I don't understand the board cases to hold that self-employment takes a person out of the labor market or makes him not available for interim employment, as a general rule.

Q You understand that it does today?

A That it does not. That, per se, self-employment does not remove him from the labor market or, per se, make him unavailable for employment.

Q Is that your understanding?

A Yes.

Q Wer you guided by that?

A Yes.

Q To the extent that individuals did work during the back pay period for their own concerns, did you exclude them from the bak pay specifications for the periods indicated?

A No, I did not.

Q You did not?

A I did not exclude them, no.

Q Would those individuals be the same list that you read off before?

A Yes, yes, those are the --

Q Isn't it a fact that if those individuals derived income from those corporations and then also got a back pay award, they would in effect be made more than whole?

A That would be true if their interim earnings in the form of wages and profits were not subtracted from the gross back pay.

Q You mentioned before that your agency had certain records, that there were disputes still pending after the reinstatement period order by Judge Rosling.

You made reference earlier today, is that not true, that your office had certain indications that there were disputes back and forward?

A Yes, they said complaints or allegations came in alleging the order was not being complied with.

Q Do you know the names of those individuals?

A No, I can't -- I don't know.

Q Do you know whether they were any of those self-employed individuals?

A I don't believe they were.

Q So to the best of your knowledge any of the complaints that came in were not from those individuals; isn't this a fair statement?

A To the best of my knowledge, yes, sir.

Q Now, did you, in the course of your computations, examine the employer records that you say you had reviewed with an eye towards determining their debt position, their debts owed, accounts payable?

A No,no.

Q Do you recall whether you considered wholesale business and retail business in the composition of what the employers had prior to the unfair labor practice?

A No, I did not. I did not make any analysis of the proportions of wholesale and retail business which each of the employers had.

Q Do you recall whether this was a factor in their business? Was there substantial wholesale business prior to February 1, 1967?

A Well, it is my understanding that some of the conditions vary from one employer to the other but it is my understanding that some of the employers had substantial wholesale business.

Others had lesser amounts.

Q Would it be fair to say most of the employers prior to February 1, 1967 had substantial wholesale business?

A I really don't know, Mr. Siskin.

Q Now, following the unfair labor practice did you make an analysis of what percentage of the business was wholesale and what percentage was retail?

A No, I did not.

Q Did you make an analysis as to what percentage was grocery business, so to speak, items other than bagels prior to February 1, 1967 and after?

A I believe some of the employers did submit -- well, I withdraw that.

Let me put it this way:

At a minimum representations were made to me that some of the post lockout business was nonbagels, grocery and related items, and I have every reason to believe that that is true.

Exactly how much and in what proportion or how it related to each particular employer, that I don't know.

Q Well, if you were comparing financial records in exhibits having to do with volume pre-lockout, post-lockout, et cetera, you would have to compare eggs, and eggs, wouldn't you? The same factors in both; isn't that a fair comment?

A More or less.

Q And if in fact pre-lockout figures reflected solely bagel sales, and if in fact post-lockout figures reflected bagel sales plus other sales, so to speak, grocery sales, you couldn't compare those either, could you, and come up with an equitable comparison?

A Not fairly. I can only compare for my purposes bagel sales with bagel sales.

Q So that if in fact using a hypothetical, if bagel sales in one shop were $100,000 in 1966 and in 1967 you saw a figure which said $75,000, purely by the term sales you wouldn't be in a position to evaluate the totals; isn't that fair?

A That is correct.

Q Because it would appear that you would have to go one step further and ask what figure in the '67 and '68 sales, et cetera, were represented by sales that were dissimilar to the base year sales.

A Correct. I would regard nonbagel sales as not particularly relevant.

Q And in the figures you saw which were tax returns, et cetera, you saw as you have already testified, financial figures submitted to you by the employer shops, right?

A Yes.

Q When you saw those figures you saw, as you said before, significant reductions in sale, isn't that true, substantial reductions?

A Yes, yes.

Q Isn't it true then that if in those reduced sales, already reduced sales there were significant grocery sales, that you would have to exclude the grocery sales from those subsequent years in order to arrive at a fairly comparable dollar number; isn't that correct?

A Yes, I agree.

Q If in fact the true bagel sales were only 20 percent in the year subsequent to the base year or 10 percent of the prior total, 20 percent or 10 percent of the prior total, wouldn't that be a significant figure and affect your judgment in this back pay specification?

A It would be a significant figure, yes,sir.

Q It could conceivably have changed your method of computation; isn't that so?

A Well, conceivably covers pretty broad area, yes.

Q One method of comparability is by sales dollars.

A We just discussed that.

Q How about purchases, the flour purchases you were talking about before?

Do you recall the significant variations between '66, '67 and '68 that were exhibited to you, roughly? Obviously I don't expect you to come up with --

A Well, in a general way. This would be consistent, namely, these are all different indicators of the same thing.

The proposition and the proffered proof that production of bagels decreased in the back pay period as compared with the base period.

Q Now, going back to that portion of the testimony with respect to what the average earnings were for the claimants during the base year, I am going to direct your attention to the maximum that we alluded to before by the contract clause.

If in fact the contract provided for a four day work week at $28 a day, $112 -- if on this hypothetical, that was $5600 for the year, would it be fair to say that the maximum the union contract provided for would be $5600 in any given period, according to the union contract; isn't that fair to say?

A I don't dispute your arithmetic.

Q Yet the record shows, Mr. Levy, that you ignored that clause; isn't that correct?

A I think my testimony is that -- my testimony is that I ignored that.

Q If in fact the union contract clause was a built in ceiling, if in fact it was a built in ceiling, do you have any idea what that would do to your projections?

A No, I don't.

Q Did you isolate any of the overtime during the base period at all in your notes or your work papers?

A No, I did not.

Q If in fact everything above $5600 was eliminated as being inappropriate because beyond the limitations inherent in the union contract, would it be fair to say that, using your own theory, you would exclude everything above $5600 for the claimants in the projection years, isn't that fair to say, if you used as a premise the union contract as a built in ceiling?

A Yes, I think that is correct.

Q So that for each of your claimants that you show back pay specifications of greater than that amount wouldn't you in effect be overriding a contract clause?

I appreciate just a yes or no answer.

JUDGE ROSE: I will sustain an objection to that question. You can't ask this witness for a legal conclusion, Mr. Siskin.

It just doesn't help me at all.

MR. SISKIN: I am asking for an arithmetical conclusion.

JUDGE ROSE: No, you are not. You are asking him to interpret that contract and what that contract means in terms of this proceeding and I'm not going to accept it.

Let us go on to something else.

MR. SISKIN: All I want, your Honor, is a revision in terms of the witness' own computation for the guidance of the court as to what that would be on the hypothetical that that clause would be effective.

JUDGE ROSE: You are asking this witness if five is less than ten.

I will take judicial notice of that.

Q Now, do you have the records of the earnings of the claimants here?

MR. APPELL: I do.

Your Honor, may we go off the record?

JUDGE ROSE: All right, off the record.

(Discussion off the record)

(Whereupon and at this point the examination of Mr. Levy was interrupted to accommodate the examination of another witness after which the examination of Mr. Levy continued further as follows:

JUDGE ROSE: On the record.

MR. APPELL: We were up to the point of discussing the records and further testimony of Mr. Levy.

What did we decide? Idon't know.

JUDGE ROSE: Off the record.

(Discussion off the record)

SEYMOUR LEVY

having been previously sworn resumed the stand and testified further as follows:

CONTINUED CROSS EXAMINATION

Q (By Mr. Siskin) Mr. Levy, going back to appropriate norms, gauges, measurements, bases, indices, what does the NLRB strive to effect by any particular norm or gauge? Can you explain that?

A Yes, the ultimate objective is to make the employees discriminated against whole so that he is restored insofar as practical to the condition, the monetary condition and circumstance that would have existed if the unfair labor practice had not occurred.

Q And there is no hard and fast rule for what particular gauge or norm or index or barometer or standard that you use; isn't that true?

A No, it necessarily must vary with the individual circumstances, individual cases.

Q Isn't it a fact that quite often volume is the most significant gauge, volume of business done by the employer?

A Well, it is certainly a relevant factor.

Q If you were to use volume as a gauge or business volume or purchases how would you effect the dollar computation you made? How would you compensate for it procedurally if in fact you did? How would one go about making a volume index?

A I can't recall a single back pay computation that either I worked on or that I have knowledge of other people, other regions having based it simply on an employer's volume of business.

Q How would you compensate for it? For the ups and downs of business volume if you were making an estimate or taking into account volume? Would you add a factor plus or minus?

A Well, normal levels of employment rather than that are used but it is possible that where volume is a consideration it is possible you can construct an index and as volume fluctuates during the year then the index would.

You might have your index read 100 in the first quarter, 125 in the second, 75 in the third, 200 in the fourth quarter.

Q And if in fact you had available to you volume ratios and direct labor ratios so that one could say that hypothetically if a given year volume was $100,000 labor in this year might be for argument's sake, $50,000, would this be a way of compensating for the volume factor?

A Well, it might be.

Q And if one had reduced volume in business, i.e., a contraction in business wouldn't it be fair to say that one would have reduced labor?

A Yes.

Q Bythe same percentage?

A If by appropriate means you establish a relationship between dollar labor cost and sales or purchases, any two or three relationships, and if it is valid, then the fluctuations in one would influence or control the fluctuations in the other.

Q In most industries there is a correlation between labor and volume; is that not true?

A Yes.

Q A consisent pattern so to speak?

A Yes.

Q So that in most industries one could say that industry-wide you could almost say this would be a norm for a percentage of labor to sales; isn't that true?

A Yes, I believe that is so. I believe accountants use these things to observe whether their client is going uphill or downhill.

Q Would it be fair to say that this bagel industry is representative of any industry with respect to that barometer and that gauge?

A I don't think it is, I mean, to economic laws.

Q So that applying what we have just gone through to the back pay specifications for the periods here, if in fact one were to take into account volume and there had been in fact a reduction in bagel sales, if you applied the norm of direct labor volume you would have to come up with a reduced percentage for the back pay specification periods; isn't that correct?

A Granted your premise I think the conclusion fairly flows from it.

Q Now, is it fair to say that the volume of the producers represented by the Council were controlled by factors out of their control so to speak, they had no controlling influence upon the market to the best of your knowledge, isn't that true?

A For the demand for their product?

Q Yes.

A Yes, I think that is essentially so.

Q Is it fair to say then that if volume went down it was due to conditions beyond their control?

A No, I don't think that necessarily or largely follows from what you said before.

Q Well, you said they did not dominate the market; isn't that true?

A Correct.

Q You also stated they were not in a position to control the market.

A Correct.

Q And if they did sustain a loss in volume is it fair to say that that loss of volume was attributable to factors beyond their control, market conditions to to speak?

A Yes, yes.

Q Did you make any exhibits at all with respect to volume, flour purchases, any schedules or subschedules in your work papers?

A No, I did not.

MR. SISKIN: I have no further questions of the witness at this point without looking to the credit exhibits.

Do you want to give me a start?

JUDGE ROSE: You indicated it would take about 20 minutes.

MR. SISKIN: Just give me two or three, 10 minutes will do it.

JUDGE ROSE: We will be in recess for 10 minutes.

(Short recess taken)

JUDGE ROSE: On the record.

Now, we have been in recess for about an hour.

Counsel for the respondent requests of counsel for general counsel certain documents in general counsel's possession concerning that which were furnished by the back pay claimants from which then were calculated both their back pay and their interim earnings.

I understand now there is some question, Mr. Appell, concerning how much or what of these documents you intend to furnish; is that correct?

MR. APPELL: Yes, your Honor.

JUDGE ROSE: Would you like to state general counsel's position?

seven days. It was $26.00 minimum day. Minimum day.

That did not mean that we stopped at 26. We very rarely ever made 26.

The standard practice, the thing that was, that existed, we made a lot more each day.

We made 50, we made 70, whatever the traffic called for. Whatever the amount of work they wanted.

It was piecework.

Q Do you recall whether there were prohibitions against overtime in your Union contracts during those years?

A I do not know what was in the Union contract during those years.

I don't remember.

But I do know this. That whatever was in the contract, we were asked to make more -- more work than the hundred boxes, by the bosses, themselves. And they needed it, and we gave it to them.

Q Again, did you ever see the Union contract during those years?

A I just don't recall.

Q Now, is it fair to say that there were four days normal work week, without overtime, or five days?

What was the normal trade practice?

MR. APPELL: Can we set a time, Your Honor?

Q In the year 1966, '67 and '68.

A Could I hear that question again?

I don't quite catch it.

Q Sure.

Can you tell me what the normal work week would be in terms of days, during the year '66, '67 and '68, as far as you were concerned, to the best of your recollection?

A As far as I was concerned, in '66, I had between five and six days.

Q Does it ever ring a bell to you remember that it might have been four or five days as a standard work week?

A No, sir.

Q Do you know when overtime began with --

Withdrawn.

With respect to a rate exclusive of overtime, in a given day, is it fair to say the rate, according to your memory, was $26.00 a day, for '66, '67 and '68?

A You know, when you say overtime, I don't know what you mean by overtime.

You mean, hourse that we worked more?

We didn't work hours more.

It was piecework. That was no thing with us, the amount we made.

So, I don't know what you mean by overtime.

Q Now, with respect to your earnings during the year 1967, were you given hourly totals during a given week, as to how many hours you worked?

A Never.

It was piecework.

Q Okay.

Now, was there a standard as to what the piecework would be, for a normal day, a normal eight hour day, or whatever?

A There was no standard, because we all worked at different speeds.

It was piecework. Whatever the traffic was able to bear, whatever we were able to produce, this is what we got paid for.

This was standard practice.

Q Do you recall a time when there were -- when there was a dropoff in the wholesale trade, in the bagel business, that you were working for, and those employers that you were working for?

A Not the bakeries I was working for.

Q Do you recall a time in 1968, when there might have been any change in the wholesale trade?

A Those bakeries that I worked for, if anything, did a little more business.

Q Those were non-Counsil members, were they not?

A Those were non-Council members.

Council members had locked us out in those years.

Q So, in any given week, you would only work those shops where the Union delegate said, go to Shop X, or Shop Y, or whatever?

A No. I didn't say that.

There were certain shops I was set in on given days, and those shops the Union couldn't take me out of. This was my job.

Sometimes I would get an extra day's work someplace, but this was sometimes.

MR. SISKIN: I have no further questions of the witness.

JUDGE ROSE: Anything further, Mr. Appell?

MR. APPELL: No, Your Honor, thank you.

JUDGE ROSE: I have a couple of questions, Mr. Silverman. Maybe you can explain it to me.

In the years 1966, 1967, what was the basis of your compensation?

How did a bagel baker get paid?

THE WITNESS: It was piecework.

JUDGE ROSE: Explain that.

THE WITNESS: Yes. I'll try to explain it.

We made a certain amount of bagels.

JUDGE ROSE: How many?

THE WITNESS: I'm coming to that, Your Honor. Please have a little patience.

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We would put sixty-four bagels in a box. Seven boxes would be counted as eight. Fifty-six was considered a box. Fifty-six bagels was considered a box of bagels.

JUDGE ROSE: Fifty-six bagels?

THE WITNESS: Yes, was considered a box.

For every fifty-six bagels we made --

We worked with a partner.

For every fifty-six -- at that time, it was 26¢ a box. I would get paid 26¢ for the box, and the man who's my partner would get paid 26¢ a box.

Sometimes we would do what they call the single.

If I worked by myself, I would get 52¢ for the box. I wouldn't have a partner then.

Because, whatever he made, I shared, you see?

It was shared that way. We were -- We were allotted at least a minimum.

If we went into a bakery, we had to earn at least our $26.00 for the day.

If the man only had one bagel to make, if he needed a man, he had to pay the man for his day's work.

If he needed more, he would request more, and we would give it to him.

And the standard practice was generally, it was very, very rare we only made $26.00. We made a lot more.

Also, besides that pay, and I don't know why this is not taken into consideration, and why we're limited, besides that, there was money sent up to the Union, vacation money, holiday money, and in 1966, I earned vacation pay, $1,239.00, which is not listed on there, but this was actual pay that I got.

JUDGE ROSE: How much was that again?

THE WITNESS: $1,239.76.

In 1967, on that, we received on that vacation on the holiday pay, $224.44. But, there was a change made in '67, and that's why I don't know why we're limited to the amount I'm limited.

Besides the day's pay that we earned, the 26¢ a box, instead of giving the Union the money, to give us for holiday and vacation, they got into a new system, and they allotted us on top of whatever we earned piecework, three and a half dollars a day to go towards our vacation, and holiday.

This is not even listed here.

And while it is said that I earned $1,891.00 from Benson, my actual loss from '66 to '67 was $3,564.92. Actual loss, $3,564.92.

And, also, the -- according to this thing that I have here, it states -- it states over here, according to the Second Circuit Court --

JUDGE ROSE: Mr. Silverman, I'm not interested in what the Second Circuit Court had to say.

What I'm trying to get from you, really, is just the basis of your compensation.

THE WITNESS: Yes, all right.

This is the way it was done.

JUDGE ROSE: Tell me, how many hours a day, if you were working with a partner, would you work to make, I guess it would be a hundred boxes?

Is that right?

Is that what --

THE WITNESS: Yes.

JUDGE ROSE: If each of you got $26.00 --

THE WITNESS: It would be a hundred boxes.

JUDGE ROSE: How many hours would it take you to do that?

THE WITNESS: That depended upon the man.

As I said, it was piecework, hand work.

I was a very fast worker.

It took me four hours.

Someone else, it would take six hours. Someone else, it would take eight hours.

All depended upon the ability of the man, and the speed of the man.

JUDGE ROSE: It would take you four hours to do a hundred boxes by yourself or with a partner?

THE WITNESS: No, a hundred boxes.

If I made fifty, it was considered a hundred.

I got paid for a hundred, because, as I said, both of us got paid.

If I made a box, my partner got paid for it, too.

If I made it myself, I would get doublt the amount, 52¢.

So, fifty boxes was considered a hundred, if you made it by yourself.

If you worked with a partner, you had a hundred boxes between you.

A hundred boxes, I got $26.00, he got $26.00.

JUDGE ROSE: Right.

When you worked with a partner, did you both do the same thing?

THE WITNESS: We both did the same thing.

I may have been faster than him, but we shared the amount of money. Didn't matter who was faster. The pay was shared between the two partners.

If I had a man that was, that I was twice as fast as, I still shared my pay with him.

JUDGE ROSE: I see.

What time of day would you go to work?

Normally.

THE WITNESS: It varied with days.

JUDGE ROSE: Can you tell me from what hour to what hour?

THE WITNESS: Well, there were bakeries that I would go in eight in the morning, and I stayed until three, four in the morning.

And there were bakeries I would go in at four o'clock, and leave at 7:30, eight o'clock. I mean, in the afternoon.

It's all according to the amount of work that I did. What was involved.

And then they had shifts, came the weekend, the weekend is Thursday, Friday, Saturday, they needed stuff in the stores for Saturday and Sunday. Then they would have shifts.

I would come in, say, in the morning, and I would make three, four hundred boxes, whatever it is, it would take me sixteen hours, whatever the amount was. Then there would be another shift right after me.

This would continue around the clock over the weekend, according to the bakery. Some bakeries had less.

But, generally speaking, this is the way it would work. There were some bakeries that didn't need so much on Thursday, so they had Friday, Saturday, Sunday was not so busy. Sunday they worked for Monday. That was an ordinary weekday already. It slowed up a little bit.

We would work around the clock. All depended upon what they needed.

And there would be shifts, like I said.

JUDGE ROSE: Are bagels normally baked for consumption on the day that they're baked?

THE WITNESS: For the next morning.

It's baked at night, delivered to the stores during the night, and they sell it the next day.

JUDGE ROSE: So, the number, if I get your testimony right, the numbers of hours that you would work for any given bakers, would vary?

THE WITNESS: Very much.

JUDGE ROSE: Depending on the requirements of the job?

THE WITNESS: Very much,yes.

JUDGE ROSE: Now, for a particular bakery, week after week, would the hours be about the same?

In other words, would they have about the same amount of business for you?

THE WITNESS: Generally, yes.

There have been exceptions.

Sometimes they get special orders, and then, too, on delivery, sometimes they would make delivery the same day, on certain things. But, generally, it was for the next day. I'm speaking about generally.

Q (By Mr. Siskin) Now, in your own mind, was there, in any period of time, in that time, when you worked overtime, '66, '67 or '68?

A Overtime, you mean more than five days?

Q Well, what did you consider to be overtime in the industry?

A Overtime was if they needed an extra dough, another three hours of work or something like that, what I considered overtime.

Or a special order that came through. That was considered, what I would consider overtime.

Q And are you aware that, whether or not it was a Union requirement, that there be no overtime, or were there any restrictions on overtime?

A No.

In fact, as far as I know, we were always told to make it.

Q Now, was there ever any slack periods during the years '67 or '68?

A In '67, it started to fall off.

The work started to fall off.

Q How about '68?

A I went into business at the end of '67, around November, December, and lasted until about May of '68, which I went broke.

Q What kind of business was that?

A Bagel business.

Q What was the name of that Employer?

A Fertel Bagels.

Q It's not listed, though?

A I didn't make anything.

Q I see.

But when did you go into business on your own?

A Around the middle of November of '67.

Q So, is it fair to say that for those last six weeks, you worked full time for yourself, in your own business?

A You can say that.

Yes, I would say that.

Q In other words, for the last month and a half?

A Yes.

Q And during that period of time, were you operating as a corporation, or an individual?

A A corporation.

Q What was the name of that corporation?

A Fertel Bagels.

Q Where was that store located?

A On Jericho Turnpike, in Huntington Station.

Q Did you have a lease on a --

A A store?

Q -- a store?

A Yes.

Q When did you take out that lease?

What period of time did it run?

A In that time.

In, probably I signed it, maybe, October or November of '67.

Q How many people did you have working for you?

A There were no people.

Q Just yourself?

A Yes.

Q How many hours a day did you work?

A I stood there about twelve hours a day, maybe longer.

Q Was that five, six or seven days a week?

A I took off Monday.

Q Do you recall what the -- what the industry conditions were in the year 1968?

Had machine competition entered into the field?

A I don't remember any machines, but for myself to work -- when I left, the work started to go down.

They started taking away the work, and it started to go down. They started splitting it up because of the lock-out.

But, do you recall whether there were any severe competition coming in from some of the frozen bagels?

A Now that you mention it, the frozen ones, I think om Buffalo.

Linder?

A No, not Linder.

A VOICE: Ables.

Q Do you recall what the name was?

A I heard what he said.

Q Is there any name that will refresh your recollection?

A Maybe Ables.

I remember there was a frozen one that started to come in.

Q Do you recall the name W & S?

A No.

Q Throgs Neck Bakeries?

A I've heard of that one.

Q Does that ring a bell as far as machine made bagels?

A No, not really.

Q Did you -- Did it ever --

Did you ever hear any talk about wholesale, loss of wholesale volume?

A No.

While I was working, the work was pretty good, you know, in the shops.

Q And did there come a time when you went back to working again in the Bagel Union?

A Yes.

wholesale?

A I was working to the last minute when they were baking wholesale until he bought the machine.

Q Who is that?

A Bagel Wheel.

Q He had wholesale from 1967?

A No.

Q He never cut it back?

A No.

Q Did he have it back in '67?

A All the years, even today.

MR. APPELL: No further questions, Your Honor.

MR. SISKIN: I have no further questions of this witness.

HEARING OFFICER: Thank you very much.

You are excused.

We will be in recess until 1:00 o'clock.

(Recess taken.)

HEARING OFFICER: Back on the record.

Whereupon,

SIDNEY H. LEVY

having been previously sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION (Cont.)

Q (By Mr. Siskin) Mr. Levy, in your computation of the base year 1966 earnings and your computation of what you consider to be back pay deficiencies, is it not true that you have had information available to you in your computations of both council's earnings of the various employees and non council for the base year?

A Yes.

Q And you also have that information with respect to the year 1967 and the first nine months of 1968?

A Yes.

Q Would you say that the work that was affected by you in your computations is in effect a statistical analysis?

A No.

Q What would you say it is?

Projections?

A I would say it is a tabulation and computation of the earnings of the named claimant in those three years, allocated to council members and non council members.

Q They are only earnings per se as you testified to and do not take into account hours of time, is that a fair statement?

A Correct.

Q Nor do they take into account the union contract, is that a fair statement?

A Correct.

Q Nor do they take into account any particular special situations of non council members, isn't that further correct?

A Correct.

Q So that any incident or any factor that affected no council members for the projected years was not considered by you, isn't that also correct?

A Correct.

Q Isn't it also correct that you did not consider any volume factors of non council members in your projections for '67 and '68?

A Mr. Siskin, when you ask me whether I considered something, you are opening up a whole area of what reflections -

Q I will rephrase it.

Did you compensate or adjust in your projections any volume factors or any special situation factors that applied to non council members for the years 1967 and a portion of 1968?

A No, I did not.

Q When you came up with back pay deficiencies for the years 1967 and '68, is it fair to say that your computation of a deficiency in effect charged the council members for the entire lost earnings of the individual, claimed lost earnings for the years 1967 and 1968?

A That is substantially correct.

Q Let's go on from that point.

So that in effect if there were factors which were contributed to a diminution of earnings by any of the claimants which were attributable to non council members, factors or consideration or whatever, they were not excluded or adjusted or in these computations, isn't that correct?

A That is essentially correct.

Q Isn't it also correct that if volume conditions would have required a diminution in payroll for the projection year period of back pay, that that volume consideration would be allocated between council members and non council members to come up with a total equal to an imgainary or hypothetical or actual volume factor, isn't that correct?

Youwould have to break down the volume factor between the council members and non council members if there was in fact a volume factor, isn't that correct?

A Probably.

Q To the extent that your computation reflects a charging of the entire decreased earnings of any of these claimants for 1967, 1968, to the council members, to that extent would you say that the council members have in effect absorbed in your computations the entire decrease in back pay sustained by the claimant in your computations?

A Yes.

Q Were you aware when you did these computations that they individuals who were in the scheduled back pay were assigned jobs by the union delegates rather than by their own choosing rather than by the employers?

Are you aware of that?

A I was aware of the general practice prevailing in the industry as between the employers and the unions, yes.

Q Were you aware of that particular problem?

A Yes.

Q Would you say that you made an analysis of that selection, union selection of hiring process at the time you made this analysis or prior to?

Did you evaluate that factor as to which shops employers would go to by chance, by selection or by individual preference?

Did you analyze in any way the job selection process as it affected this computation?

A I think the correct answer to your question is no.

Q If when you took a look at these figures you saw individuals going to non council members during the back pay period, in some cases substantial amounts were shown and in some cases they were not.

If you took a look at the individual totals, did you come to any conclusion as to the relevancy of any of those totals varying between individuals, that is to say, that in certain cases certain individuals had substantial non council employment during '67 and '68 and in certain cases they did not?

Did you analyze that as a factor or see why it was erratic or not erratic?

A I'm aware of the fact there is a considerable range in the claims made on behalf of specific individuals.

Is that what you are getting at?

Q Yes.

A As to exactly why Mr. X ended up with a claim of 1,000 and a $10,000 cliam for Mr. Y, I do not have further facts or information beyond what is explicit in the computations.

To the best of my knowledge and belief all of the individuals were willing and able to work or available for employment.

Why some achieved better interim earnings during the back pay period than others, as to that I have no knowledge.

Q Isn't what happened here in effect that you and in your computations have said that council members involved inthis proceeding must sustain a complete loss of earnings by those individuals who are claimants herein, notwithstanding the fact that their hiring or rehiring by non council members may have been dictated by the financial exigencies of the those non council members?

A I can answer that by saying the foundation of the back pay computation is that the net losses, the net back pay alleged here is alleged in this back pay specification to be the responsibility of the council members because it is in effect alleged in this computation that these losses are consequences of the 1967 unfair labor practices.

That is the foundation and premises of the back pay specifications.

Q Did you make any analysis of how many non council members there were inthe industry?

A No.

Q Did you make any analysis of the entire roster of non council members for those years as you migth have ascertained by any third party or any index listing of same?

A No.

Q Did you make any analysis of what shops were open in the industry at that particular time?

A No.

Q Did you make any analysis of business failures in the base year in the bagel field or in the additional years?

A No, I did not.

Q Wouldn't that be significant?

MR. APPELL: I object.

HEARING OFFICER: Sustained.

Q (By Mr. Siskin) Wouldn't the factor of whether a concern could be expected to survive during a projection year be a factor in your consideration?

A That sounds to me like a speculation that I would not undertake.

Q Now, you said you made an analysis of your agencies file with respect to what the history was in this litigation when you predicated this analysis?

A I tried to determine the antecedent proceedings and what bearing they had.

Q Did you discuss this case with any of the other men in your agency?

A Yes.

Q Who were those men?

A The regional attorney, the regional director.

Q Did they assist you in this computation?

A No.

Q Did they tell which method to use as to contrasted with another method?

A No.

The computation is primarily and essential mine and my responsibility subject to their overall general supervision and review.

A Yes, sir.

When in my judgment I felt the need to counsel with or discuss something that at a particular moment struck me as a problem, be economic, legal or policy wise, I would take it or discuss it with one or another of my supervisors.

Q Did you ever discuss economic factors with your supervisor?

MR. APPELL: Objection.

MR. SISKIN: I am asking questions which has relevance to Mr. Levy's utilization of factors and information which he said he checked with his associates on.

These involved consideration of which factor was selected in the determination.

HEARING OFFICER: You have already asked him a number of times what he based on the computations on.

What the foundation is for the specification.

Presumably therefore everything else was not part of it.

Whether or not he made an error is something that you should not argue with him about.

You should argue in your brief about that.

MR. SISKIN: Your Honor, what we are trying to ascertain here is which method is appropriate.

That is one of our affirmative defenses.

HEARING OFFICER: Isn't that a matter for argument?

A Yes, that's right

Q And that period of time that you were not available lasted all the way through the entire period of the back pay covered by these specifications, isn't that true?

A Repeat that question.

MR. SISKIN: Withdrawn.

Q Isn't it true that your non-availability for union employment or for selection by a union delegate for employment continued from October 1967 to the present time?

A True.

MR. SISKIN: No further questions.

JUDGE ROSE: Mr. Clark?

MR. CLARK: Nothing further, your Honor.

JUDGE ROSE: You are excused.

(Witness excused.)

JUDGE ROSE: Call your next witness.

MR. CLARK: Is David Siegel here?

MR. SISKIN: I would rather have Ronald Ostrofsky.

JUDGE ROSE: Raise your right hand.

Whereupon,

DAVID OSTROFSKY

called as a witness, having been first duly sworn in by Judge Rose, was examined and testified as follows:

JUDGE ROSE: Be seated.

State your name and spell it and give your address.

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THE WITNESS: David Ostrofsky, O-s-t-r-o-f-s-k-y, 139 Lindenmere Drive, L-i-n-d-e-n-m-e-r-e Drive, Merrick, Long Island.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Ostrofsky, during the period of time prior to the lock-out, were you a kettleman?

A Yes.

Q And were you a member of the union prior to the lock-out?

A Yes.

Q How long had you been a member of the union?

A Oh, not to long, but I really couldn't tell you exactly how long.

Q And were you here when you father was testifying a few minutes before?

A Yes.

Q And you heard his testimony --

A Yes.

Q -- in this case?

A Yes.

Q Did you go to work for your father's corporation from the time that he started in business?

A I really don't remember the exact dates.

I did work for him when he was a union shop.

Q Well, from the time that he started in business, did you switch your job and go to work for his companies?

A I don't remember if I was working or not through the union because I was only working part time.

I really don't remember.

Q Would it refresh your recollection if I showed you that your earnings for the year 1968 was solely from JAD and DAJ and as contained in the back pay specs?

A I really don't remember because I -- I think it was so confusing because I was working a day here and a day there, but nothing, you know full time.

Q Well, this is for the year '68?

A Yes, for '68, yes, I believe so.

Q Is it now your testimony that you worked solely for your father's corporations during the year 1968?

A Yes.

Q Okay.

Were you a member of the union during that time?

A Yes.

Q Did you call up the union delegate and seek any employment during that period of time?

A I don't believe so, no.

Q So from the -- was that true from the time that you began to work for your father's corporations?

A Yes, I believe so, yes.

Q So it is fair to say that from the time you worked for your Dad's corporations, you worked full time for them and did not work for any of the other shops?

A Well, when you say full time, what do you mean by full time?

I was only working part time.

It was only two or three days a week, so I'm not sure what you mean by full time.

Q Were you going to school at the time?

A Yes.

Q What school were you going to?

A Well, all right, I quit high school and I went back.

Q So you were going to high school during that period of time?

A I don't remember.

I'm not sure whether it was '67 or '68.

The dates I'm really not sure.

Q All right.

Which high school were you going to?

A Island Trees.

Q Where was that?

A That's in Levittown.

MR. CLARK: I'm sorry, where?

THE WITNESS: Levittown, Long Island.

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Q And do you recall when you left school for a period of time?

A I think that it was '66.

Again, I'm not sure of the dates.

I think that I went back in '67 or '68.

Q Well, could you check and find out?

A Yes.

Q Could you give us that information tomorrow?

A I graduated -- let me think when I graduated.

I can't be a hundred percent sure.

Q Well, would you give us that information by calling or --

A Could I call?

Q Well, we would want you to come back tomorrow.

A Well, it's hard to come back, but if I have to, I have to.

Q Well, it will only be for a short while, Mr. Ostrofsky.

A All right.

Q And when you did work for your father's concern--

A Yes.

Q -- did you work full time?

A I would say part time.

Q And when did that part time employment become full time employment?

A Never did.

in a different field.

Q And when did you graduate, approximately, I am sorry--

A '67 or '68.

I think that it was '67 or '68.

I don't know.

Q And what field was that that you went into?

A I went into -- I was a lab technician in -- I worked for Clairmont Polychemical Corporation.

Q Do you recall whenyou went to work for the lab?

A '69, I think.

Q Did you go to school for lab technician?

A No.

Q What was your job with JAD and DAJ?

A Making bagels, selling the product.

Q And do you recall when the last time was that you called the union for work?

A No.

Q But there came a time, -- did there come a time when you stopped asking the union for work?

A No, because I always had a -- I always had my union card open.

worked on Saturday.

Q Was that with the Bagel Bakers Union?

A Yes, with the Bagel Bakers Union, yes.

A Part time I think that I was working for my father.

Q Now, did you help your Dad set up his shop?

A Yes.

Q What did you do?

A Well, what do you mean by setting it up?

I would come down and help around a little bit.

Q Put in machinery?

A No, not putting in machinery.

Q In what other ways would you help?

A Well, we were doing light construction, setting up counters.

Q Do you recall when that was?

A No, not the exact date.

It was around the same time that they were setting up, you know, the shops.

Q Was it around the same time that you were going back to school?

A I think that it was right before, — right after I decided to go back to school.

Q Did you eventually get your high school degree?

A Yes.

Excuse me, if I may make a phone call to find out, you know, when I graduated --

Q I would appreciate it.

MR. SISKIN: It would save you a trip back.

Could I ask the Court's indulgence on that point?

JUDGE ROSE: Very well.

We'll be in recess for a very short period of time.

THE WITNESS: Thank you.

(Whereupon, a recess was taken.)

JUDGE ROSE: On the record.

Q (By Mr. Siskin) Did you make inquiry in the short recess, Mr. Ostrofsky, as to the time that you had gone back to high school?

A Yes.

It was January --

Q Could you tell us what that period of time was?

A It was January '67, and I graduated in August, September of '67.

Q So were you going full time during that period of time?

A Yes.

Q You were going full time from January to August of 1967.

What school was that?

A Island Trees High School.

Q What were the hours?

A 7 to -- gee, I really don't remember.

3:00 o'clock in the afternoon, something like that.

Q And during that period of time, you had a full academic session, did you not?

A Yes.

Q And you had to do homework after school, is that correct?

A Yes.

Q That was before the lock-out, wasn't it?

You started going to school before the lock-out?

A Did I?

Q Well, if I told you that the lock-out started in February of 1967, your starting school started before that, did it not?

A Yes, I guess that it did, but I hope that I have my dates straight.

MR. SISKIN: I have no further questions of this witness.

THE WITNESS: May I say something?

MR. SISKIN: Sure.

THE WITNESS: The main reason that I went back to school was because of all of the problems that was going on with the union at this time, because I had quit school when I got into the union, so that I could work full time and after I got into the union, all of this, you know, trouble back to school.

Q And when did you get your diploma?

A That, I'm not sure, because they mailed it to me, you know, and again, I'm not a hundred percent sure.

Q After you got your diploma, didn't you go to work for you Dad?

A Yes, I believe so.

Q Now, does that refresh your recollection as about the time that you got your diploma, didn't you --

A Again, everything is really fuzzy, you know, so many things that really happened.

Q Do you recall the situation in the industry at that particular time that you left to go to school?

A No.

Q No?

A I just knew that there was a lot of trouble going on, being that my father was an executive board member.

MR. SISKIN:I have no further questions.

THE WITNESS: Well --

JUDGE ROSE: Mr. Clark, do you have any questions?

MR.CLARK: Yes.

CROSS EXAMINATION

Q (By Mr. Clark) Mr. Ostrofsky, during the time that you were working as a member of the union and working

JUDGE ROSE: Mr. Appell?

CROSS EXAMINATION

Q (By Mr. Appell) Mr. Strugatch, after the lockout began, did any member of the Council, including Tri-Boro, [illegible] & H, or Pops, offer you a job back?

A No.

Q Did the Union ever advise you to go back to any of those companies that were members of the Council?

A No, sir.

Q Do you recall now whether you received vacation pay from the Union, vacation and holiday pay for '66 and '67?

A I don't think so.

Q Do you have W-2 forms?

A No.

MR. APPELL: May I ask the reporter mark this paper as General Counsel's Exhibit 7, please?

(General Counsel's Exhibit 7 was received and marked for identification, of this date.)

Q (By Mr. Appell) Mr. Strugatch, I show you General Counsel's Exhibit 7, which contains copies of W-2 forms, and I ask if you recognize those?

A Oh, yes.

Q And --

A Yes.

we got this later on, I believe. In 1966.

Q Are those W-2 forms which you received?

A Yes.

Q Do you have any reason to believe that they are in error?

A No. No.

MR. APPELL: At this time, Your Honor, I offer General Counsel's Exhibit 7 into evidence.

JUDGE ROSE: Any objection?

MR. SISKIN: Yes.

This assumes facts not in evidence, Your Honor.

There's been no -- no specifications dealing with these for '66, '67 or '68, and until the pleadings are amended, I would ask that this document not be admitted into evidence.

JUDGE ROSE: Overruled.

General Counsel's Exhibit 7 will be received.

(Whereupon, the above referred to was received and marked General Counsel's Exhibit 7 in evidence.)

Q (By Mr. Appell) What was your job in the bagel industry, in those years, '66, 7 and 8?

Were you a baker?

A Bagel baker extraordinnaire.

MR. SISKIN: I move the last remark be stricken.

JUDGE ROSE: It may be a bit self-serving, but we'll let it stand.

MR. APPELL: No further questions at this time, Your Honor.

JUDGE ROSE: Mr. Siskin?

MR. SISKIN: I have no further questions of the witness.

JUDGE ROSE: Okay, you're excused.

(Whereupon, this witness was excused.)

MR. APPELL: Your Honor, I should like to recall Mr. Sugarman, very briefly.

JUDGE ROSE: Very well.

Mr. Sugarman. Have a chair.

Let me remind you that you have been previously sworn in this matter, and you're still under oath.

MR. SUGARMAN: Yes, sir.

JUDGE ROSE: Mr. Appell.

Whereupon,

JACK SUGARMAN

called as a witness, having been previously sworn, was examined and testified as follows:

RECROSS EXAMINATION

Q (By Mr. Appell) Mr. Sugarman, I show you a W-2 form, wage and tax statement, 1966, Bagel Bakers Union Local 338, you received?

A Yes, sir.

Q To the best of your knowledge, is the amount on there correct?

A That's exact.

Q As to what you received?

A We all got, in the Union.

MR. APPELL: I ask Counsel for Respondent's to stipulate that the amount paid according to the W-2, is $1,239.76.

MR. SISKIN: No, I won't stipulate that it is the amount paid.

I'll stipulate that's what the W-2 shows.

By no means it means --

I don't believe it would indicate under pension law or welfare law, that would be the amount necessarily paid.

MR. APPELL: Your Honor, I'm just asking for the stipulation.

JUDGE ROSE: Mark the document and we'll receive it into evidence.

MR. APPELL: I'm trying to avoid that, Your Honor.

JUDGE ROSE: That's okay.

He won't stipulate and he didn't have to.

document says?

MR. SISKIN: That's what the document says.

MR. APPELL: He will stipulate that's what it says.

JUDGE ROSE: The document being a 1966 W-2 form?

MR. APPELL: Yes, sir.

JUDGE ROSE: Made out to Mr. Jack Sugarman, from?

MR. APPELL: Bagel Bakers Union Local 338, holiday and vacation pay, 131 University Place, New York, New York.

JUDGE ROSE: Okay.

And is that part of the income tax return of 1966?

MR. APPELL: It is.

JUDGE ROSE: And was income tax paid on that amount, as reflected by the tax return?

MR. APPELL: I'd have to check, Your Honor, whether it was specified in the income tax return.

Q (By Mr. Appell) Mr. Sugarman, did you submit this wage and tax W-2 form with your income tax return?

A Yes.

Q And the best of your knowledge, that is the amount you received from the Union in 1966?

A Yes, sir.

There's another one, too.

Q Now, I show you a similar form from Bagel Bakers Union

Local 338, holiday and vacation pay, for 1967.

Is that your W-2 form?

A Yes.

Q The amount on there, $224.44, is that the amount you received in that year?

A Yes, sir.

MR. APPELL: At this time, I would call upon Counsel for Respondent to stipulate that that W-2 form does reflect the amount of $224.44, as being received by Mr. Sugarman.

MR. SISKIN: Not necessarily the amount being received. It's the amount shown and alleged on the W-2.

MR. APPELL: Yes.

MR. SISKIN: Yes, I so stipulate to that.

JUDGE ROSE: Very well, that stipulation is received.

MR. APPELL: I have no further questions of the witness, Your Honor.

JUDGE ROSE: Mr. Siskin, any questions?

MR. SISKIN: No further questions.

JUDGE ROSE: You're excused, Mr. Sugarman.

(Whereupon, this witness was excused.)

JUDGE ROSE: We'll be in recess until 1:15.

(Whereupon, the hearing was recessed for lunch at 12:15 o'clock P. M.)

oOo

if he will, to stipulate that the '66 W-2 for the Union holiday and vacation pay, for Mr. Levy, indicates wages paid subject to withholding, in '66, as being in the amount of $1,239.76.

MR. SISKIN: Yes. I so stipulate.

JUDGE ROSE: Very well.

The stipulation is received.

MR. APPELL: I have no further questions of this witness, Your Honor.

JUDGE ROSE: Mr. Siskin?

MR. SISKIN: Yes.

REDIRECT EXAMINATION

Q (By Mr. Siskin) Do you know how welfare benefits were computed?

A What?

Q How welfare contributions were computed?

A Where, in the Union?

Q No, by the Employer?

A How they were paid?

Q Yes, on what basis?

A They didn't pay it to us, they paid it to the Union.

Q Did they base it on some sort of prorated factor?

A On what the earnings were per box.

Q Do you know that to be a fact?

A That's right.

Q Do you know that to be a fact?

A That's right.

Q For which years?

A Well, ever since they started paying vacation and welfare.

Q Now, it wouldn't only be the Council shops that would contribute to that, it would also be the non-Council shops, isn't that correct?

A That's right. That's right.

Q Do the rates stay constant for all the years, or did it change?

A It kept changing.

Each year was a new contract, it was more money.

Q Or it might vary, isn't that correct?

A Yes.

It mainly depended upon how much a shop baked.

How much the bakery baked. The more they baked, the more pension and welfare they had to give.

MR. SISKIN: I have no further questions of this witness.

MR. APPELL: I have nothing further, Your Honor.

JUDGE ROSE: Very well, you're excused, Mr. Levy.

(Whereupon, this witness was excused.)

JUDGE ROSE: Call your next witness.

We'll take a ten minute recess first.

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JUDGE ROSE: On the record.

MR. SISKIN: Mr. Louis Madorsky.

Whereupon,

LOUIS MADORSKY

called as a witness, was duly sworn and testified as follows:

JUDGE ROSE: Please be seated.

State your name and address for the record.

THE WITNESS: Louis Madorsky.

18 Salem Road, Rockville Center.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Madorsky, what is your occupation?

A Bagel Baker.

Q And how long have you been a bagel baker?

A You want it in years or --

Q In years.

A Well over 40.

Q And was there a time where you were in the Bagel Union?

A Yes.

Q When was that?

A In 1938 to 1946.

With a time out period for serving in the army.

Q And did there come a time when you went into business?

A Yes.

Q Did you subsequently set up some establishments that produced bagels?

A Yes.

I didn't set up, I'm sorry.

I -- we bought a bagel bakery that was already in existence.

Q All right.

What was the name of that bagel shop?

A Queensboro Bagel Bakery in 1946.

Q Subsequent to that, did you establish a shop called Bageltown, Incorporated?

A That's almost 20 years later.

Q When did you establish Bageltown, Inc.?

A I think it was in June of 1965.

Q And where was that shop located?

A At 3263 Hempstead Turnpike, in Levittown, Long Island.

Q And did you operate that shop with other people?

Other owners?

A At the time, with my brother, Julius Madorsky.

Q Were you an officer of said corporation?

A I was.

Q Were you familiar with the books and records of said corporation.

A I was.

Q Did you assist in the preparation of the daily books and records of the corporation?

3 A I did.

Q And did you subsequently sign corporation income tax returns?

A I did.

Q That was for the corporation Bageltown, Inc., was it not?

A Yes.

Q Are you aware of the years that are involved in the proceeding herein?

A I am.

Q Did there come a time when you filed a corporation tax return for the year July 1, 1965, and June 30th, 1966, for Bageltown, Inc.?

A I did.

Q Did you sign that return?

A I did.

Q Did you file it with the Internal Revenue Service?

A I did.

Q If I show you this return, is this a true copy of the return that was filed?

MR. SISKIN: Mark it for identification.

(Respondent's Exhibit 17 was received and marked for identification, as of this date.)

Q (By Mr. Siskin) Can you identify this document that I am showing to you, Respondent's 17, marked United States

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Corporation Income Tax Return-1965, for the taxable year beginning July 1, 1965, ending June 30th, '66?

A Yes.

MR. SISKIN: I want to ask that this be introduced in evidence.

JUDGE ROSE: Any objection?

MR. APPELL: No objection.

Q (By Mr. Siskin) Did you also bring -- did I --

JUDGE ROSE: Excuse me.

Respondent's Exhibit 17 is received.

(Whereupon, the above referred to was received and marked Respondent's Exhibit 17 in evidence.)

Q (By Mr. Siskin) Did you also bring with you today, a corporation income tax return for that same corporation, for the following fiscal year?

A I did.

Q And did you cause the original of that copy that you have here today, to be filed with the Internal Revenue Service?

A I did.

Q During the year July 1, 1966, through June 30th, 1967, were you familiar with the books and records of Bageltown, Inc.?

A I was.

Q Did you maintain those records on a daily basis?

A Can you give me those dates again?

Q July 1, 1966, through June 30th, 1967.

A There was an interrupted period at that time, where the status of the business changed, in a sense that we took a partner in, and there was a complete change of the whole operation itself, so it's not a comparable period with regards to the previous return.

Q But this did reflect the results --

A This reflected, yes. That was a total reflection of the fiscal year.

Q Okay.

And did you -- did the corporation retain you as an officer during that period of time, also?

A Yes.

Q What was your title at that time?

A President, I believe.

Q And --

A All right.

Q And --

MR. SISKIN: I ask that this be marked for identification.

(Respondent's Exhibit 18 was received and marked for identification, as of this date.)

Q (By Mr. Siskin) I'm referring now to a document marked United States Corporation Income Tax Return, 1966, for the taxable year beginning July 1, 1966 and ending June 30th, 1967, for Bageltown, Inc.

Is this the copy of the return that you did file with the United States government for that period of time?

A Yes, it is.

MR. SISKIN: I'm going to ask that this be introduced in evidence?

JUDGE ROSE: Any objection?

MR. APPELL: No objection.

JUDEE ROSE: Respondent's 18 is received.

(Whereupon, the above referred to was received and marked Respondent's Exhibit 18 in evidence.)

Q (By Mr. Siskin) And did you also bring with you, today, a copy of the same corporation's tax return for the immediate subsequent year?

A I did.

Q And would that be the year for the taxable return for the period beginning July 1, 1967, and ending June 30th, 1968?

A It was.

Q Were you an officer of the corporation during that period of time?

A Yes, I was.

Q And were you familiar with the books and records during that period of time?

7 A I was.

Q And do you know of your own knowledge that this document that I have in front of me marked Bageltown, Inc., U.S. Corporation Income Tax Return, that you present today, is a true copy of the original of the return that was filed with the Internal Revenue Service?

A Yes.

MR. SISKIN: I ask that it be marked for identification.

(Respondent's Exhibit 19 was received and marked for identification, as of this date.)

Q (By Mr. Siskin) I ask that this be introduced in evidence.

JUDGE ROSE: Any objection?

MR. APPELL: No objection.

JUDGE ROSE: Respondent's Exhibit 19 is received.

(Whereupon, the above referred to was received and marked Respondent's Exhibit 19 in evidence.)

Q (By Mr. Siskin) Now, during the period of time that you were in the bagel bakery business, from the time you first went into it, did you do anything else, have any other business pursuits?

A None at all.

Q Were you active on management committees, or management organizations?

A I was.

Q And were you familiar with business conditions in the industry, as a whole?

A I was.

Q Did you serve on the Bagel Bakers Council?

A I did.

Q Can you tell us when you first participated in the Bagel Bakers Council?

A I think beginning in the middle 1950's or '51 or '52.

Q Did you serve continuously since then?

A Since that time.

Q And in the shops that you owned, did you hire Union employees?

Were you a Union shop?

A I was a Union shop, yes.

Q How many people did you have in Bageltown, from the time you started?

A Well, that would go to 1965, when we started we had --

You're talking about bagel baking people?

Q Yes.

A Four Union people.

And if there was any extra work, the Union would send in extra men. Whatever couldn't be made by the four people.

Q Would you say that your shop was a handicraft shop?

A It was definitely a handicraft shop.

Q Now, did you , as part of your duties, as an officer of Bageltown, Inc., have to participate in sales efforts?

A That was my prime purpose of being up there.

Q And what participation did you partake in selling?

A Soliciting trade, arranging with the particular customers as to a price structure.

In the solicitation of the trade, it took me to the various different supermarkets, wholesale bakers, bread bakers, and whoever was available so that we could sell more bagels, so to speak.

It was a constant continuous search for new customers.

Q Did you, as part of your duties, engage in any sort of comparative shopping?

A I don't follow that question.

Q Comparative shopping. Comparative marketing. Comparative shopping, seeing what other bagel bakers were producing in the market at the time?

A Not so much as to what they were producing, but the price structures involved.

That's what we were all aware of. Because the price structure seemed to be a very big factor.

Q And would you say at that particular point just prior to 1967, that you were familiar with the price structure in the industry?

A I was.

Q Were you familiar with the competing prices that were

10 in the market, at that particular time, for the various major producers?

A I was aware of it.

Q Were you familiar with the cost structure in your establishment?

A I was familiar with the cost structure.

Q Were you familiar with prevailing cost principals in the industry itself, during that period of time?

A I don't --

Q Were you familiar with what the normal cost would be ot produce a bagel?

A Yes.

Q In the industry, at that particular time?

A Yes.

Q And have you remained on the Council up to the very -- this very moment, today?

A Yes, I have.

Q Now, with respect to Bageltown, would you tell us what conditions existed in the industry, in 19 -- at the close of 1966, just prior to the lockout situation that materialized?

A In 1966, as I mentioned earlier, we had gone into business in Bageltown in 1965, in June, or the beginning of July, and it took us from 19 -- from June of 1965 up through '66, in order to establish some kind of a base in

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the Levittown area, because we had just gone into a new feature of our particular business, which was the retail end of the business. The wholesale end of the business, as we had gone into the retail end of it, was starting to decline in 1966, because of loss of particular large customers that we had by their, in one partucular instance, their going out of business.

In another instance, where there was an outside source that cut out cost structure down, our price structure down, that we couldn't compete.

Then, generally speaking in December, I remember, of 1966, I had a problem with the Waldbaum's Supermarket Chain, where they were being approached by an outside source, at a ridiculously low price, that I couldn't compete with.

At the time I had called the Union up and told them that I'm going to lose the Waldbaum Chain, of which I had received quite a number of their stores, and we -- I spoke to the delegate personally, and we tried to work out a formula whereby in that particular shop alone, this was not an industry-wide feature, that the men who were working in the shop with me at the time, were offering some extra labor on their part, at no cost to me, to counteract the cost depreciation to the Waldbaum Chain.

But I could never come to any terms because the amount offered to me would not warrant my continuing to

12 serve the Waldbaum stores, because they gave me a deadline as to when they were going to cut out our orders.

Q How many stores did you have in the Waldbaum Chain?

A Out of the --

Q As an account?

A I think in Bageltown I had about 6 or 7 of their stores.

Q Now, you mentioned a company that went out of business in 1966.

Can you tell us the name of that company?

A That was the Duggan Baking Company. Duggan Brothers.

Q Did you supply the Duggan Baking Company?

A I did.

Q Now, will you tell us some other customers that you had, that were major --

A Can I revert back to this Duggan?

Q Yes, certainly.

A I know they went out of business, but I didn't serve them out of the Bageltown Bake Shop, because I was involved in two other bakeries.

I'm just stating the Duggan factor with regard to a decrease in the number bagels being sold by our particular bakery. So there was less bagels being produced by our shops.

Q Is it fair to say that your testimony as to the other two bagel shops, will apply to the Duggan?

A I would have to reflect as to when they went out of business, if it was in '64, '65, or '66. They affected one of the bakeries.

Q With respect to the chain store, wholesale accounts, as they were called, did you have any -- did you have any discussions with Waldbaum's as to possibly preserving the account?

Retaining the account?

A The only discussions I had with Waldbaum's was one particular gentleman there, who , at that particular time, I don't know what he's doing now, but he told me that if I can't meet that particular price, I should stop delivering. And that was the extent of our discussion.

Q What was that price?

A It was in the 50¢ range.

Q 50¢ representing what --

A Per dozen bagels delivered.

Q And what were you delivering them for?

A I think it was 61¢ a dozen.

Q And can you tell us who was your competitor that had come in with the low price?

A I can only say this as to what I heard from the Waldbaum's store, that he's getting it from out of town. Meaning from a new bakery that I assumed had gone into business, that had seemed to be on the verge of undercutting all the supermarket chains, because --

MR. APPELL: Your Honor, I move to strike everything concerning what this witness assumed, and means.

JUDGE ROSE: What he what?

MR. APPELL: I would move to strike in fact everything in the answer, other than what Waldbaum's told him, which was it was a competitor out of town.

The rest is pure conjuncture on the witness' part.

JUDGE ROSE: That's true.

Sustained.

Q (By Mr. Siskin) What specifically did Waldbaum tell you about this competitor?

Do you recall?

A I can only recall that he said that he would get bagels cheaper, and it would be from a new outfit that just opened up.

But I do know for a fact that in the time period involved, that a new bakery was opening up on Throgs Neck, with machine operation.

JUDGE ROSE: Well, Mr. Siskin, I'm going to have to strike that.

That's obviously hearsay. I can't make findings based on that.

Q (By Mr. Siskin) Now, did you subsequently lose the

15 Waldbaum's account?

A I did.

Q Do you know when you lost the Waldbaum's account?

A I think it was in January of '67.

Q And --

JUDGE ROSE: Excuse me.

Do you know, sir?

THE WITNESS: Yes, it was in January, '67.

JUDGE ROSE: It was in January, '67?

THE WITNESS: Yes.

Can I add something to that, Your Honor?

JUDGE ROSE: Go ahead.

THE WITNESS: Subsequent to that particular point in time, I have never served another Waldbaum's store, even subsequent to that particular time.

So, it was in January of '67.

Q Now, did you lose any other wholesale accounts at that particular point in time?

A Herman Star Bakery.

Q Where were they located?

A In Lindenhurst, Long Island.

Q Did you lose that account and had it been serviced from this shop?

A From that shop.

Q Now, when you say you had wholesale accounts, can you

16 tell us how you serviced these wholesale accounts, before you lost them.

A We were affiliated with the Teamsters Union, and we had a truck and a driver and we had a truck and a driver and a helper delivering all those particular wholesale stops and whatever stops we had for them to deliver.

Q And subsequent to the loss of the wholesale accounts, did you do away with the drivers?

A Yes.

Q Now, did there come a point in time when you discussed the economic conditions, in depth, with the Union?

A Personally, I didn't do it on a personal basis.

I did it with regard to the Council, because we had been in touch with them with regards to a comtract coming up. It was Contract time at that time.

Q Now, with respect to the first year, would it refresh your recollection, the first year that Bageltown was in business, as to what your gross volume was during that period of time?

Gross sales. Can you read the period that's involved by looking at the return?

A From July 1st, 1965 to June 30th, 1966.

Q Yes?

A Gross sales were $147,722.

Q Can you tell us what the gross sales were for the next fiscal year?

Reading the period.

A July 1st, 1966 to June 30th, 1967, it was $110,691.

Q And can you identify what the sales were for the next fiscal year, reading the period?

A July 1st, 1967 to June 30th, 1968, it was $87,076.

Q Do you know what the reduction in volume was attributable to, based upon your own analysis of your own records?

A Loss of business, as I stated earlier, and not serving any wholesale in subsequent years.

Q Now, expressed as a percentage of your wholesale volume, prior to 196 -- prior to June, we'll say, of 1966, can you tell us what the loss of wholesale volume was, percentage wise, for the next fiscal year?

That would be the period ending June 30th, '67.

A Well, that would encompass part of 1966.

Q Yes.

The last six months.

Q I would say it would be about a 30% drop in that particular year.

Q For that short period, for the 1966 portion?

A For the 1966-67 portion.

Q All right.

Expressed for the following year, what would it be?

18 A For the 1967-1968, against 1965-1966?

Q Right?

A It would be about 45%, I would say.

Q In addition to the 30%?

A No. Not in addition.

Q Cumulative?

A Cumulative.

Q So, is it your testimony that the cumulative effect of the wholesale portion decrease in volume, was approximately 45% in that two year span?

A Right.

Q Cumulatively?

A Cumulative, right.

Q Did you still have some wholesale accounts?

A In the general area, only.

Q After you lost these accounts?

A After the big account, yes.

Q Now, expressed as a dauly percentage of your volume, could you make a fair estimate as to what percentage of your daily production volume you lost, when you lost these major accounts?

A You'll have to rephrase that question.

Q All right.

Expressed as your normal daily production --

A Normal based on what?

19 Q What it used to be at the time you had the wholesale accounts?

A I see.

Q What the two year decline resulted in a percentage of your daily baking, you daily -- production?

A I would say it would be close to 60%, or 65%.

Q Can you tell us how you arrived at the 65%?

A Well, we were going by the gross sales figures, in 1965 and 1966. It was mostly on the wholesale level, where there was more production and more customers were bringing money in, but even though it was a cheaper price.

Subsequent to that, where the wholesale dropped, we were doing a little bit more on a retail level, and less on a wholesale. The price differential between wholesale and retail made a difference.

What I base my summation that it was about a 60 or 65% drop in the production end of the amount of bagels being made, was that I didn't need any help to make the minimum amount of bagels needed to produce that kind of sales.

Q Now, you had some other corporations at that same time, isn't that correct?

A Yes.

Q Now, was one of those corporations called Island Park-Nassau Bagel Bakeries, Inc.?

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A Yes.

Q Were you an officer of that corporation during the period prior to 1967?

A Yes.

Q Period, periods.

What was your title in that corporation?

A In that corporation I was the secretary.

Q Where was that located?

A 2941 Long Beach Road, in Oceanside, Long Island.

Q And did you cause certain corporation income tax returns to be filed for that corporation during those periods?

A It wasn't I personally, it was my brother who did that.

Q Are you familiar with the copies of the tax returns?

A I am familiar with the tax returns.

Q Do you know whether the copies you've produced here today, are exact copies of the originals of the tax returns that were filed?

A They are.

MR. SISKIN: I'm going to ask this one be marked Respondent's Exhibit 20 for identification.

JUDGE ROSE: Why don't you mark all of them?

MR. SISKIN: That's fine.

JUDGE ROSE: See if Mr. Appell has any objections to their authenticity.

MR. SISKIN: We're missing the third return.

He's going to try to find that for me, Judge.

If not today, then tomorrow. It's the third year, Your Honor.

We can't seem to find it.

(Respondent's Exhibit 20 and 21 was received and marked for identification, as of this date.)

MR. SISKIN: Respondent's 20 is Island Park-Nassau Bagel Bakeries Inc., U.S. Corporation Income Tax Return-1965 or the taxable year beginning June 1, 1965 and ending May 31st, 1966. Respondent's Exhibit 21 is United States Corporation Income Tax Return Island Park-Nassau Bagel Bakery, Inc., for calendar year '66, or the taxable year beginning June 1, '66, and ending May 31st, 1967. Now --

Q Did you sign the originals of these returns?

A I may not have.

My brother may have.

Q But you identify them as being the returns?

A Yes.

MR. SISKIN: I ask they be marked in evidence.

JUDGE ROSE: Any objection?

MR. APPELL: No, Your Honor.

JUDGE ROSE: Respondent's Exhibit 20 and 21 will be received.

(Whereupon, the above referred to was received and marked Respondent's Exhibits 20 and 21 in evidence.)

Q (By Mr. Siskin) Now, were you familiar with the books and records of this company, during those subject years, those two years?

A '65 and '66, I was.

Q How about '66 and '67?

A Only for part of the time, because then my brother took over.

Q If I showed you your -- these returns for 1966 and 19 -- for those portions of the year '66 and '67, reflected by these returns, would it refresh your recollection as to what the sales volume of that company was, at that particular point in time?

Would read the pertinent years, too, so there is no confusion?

A June 1st, 1965 to May 31st, 1966, the gross sales were $295,882.

June 1st, 1966 to May 31st, 1967, the gross sales were $202,849.

Q Will you identify the losses or the profits for the respective years?

A The loss, June 1st, 1965 through May 31st, 1966, the net operating loss here was $5,616.

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Q And can you identify the loss for the next year?

A June 1st, 1966 to May 31st, 1967, the net operating loss deduction is $4,530.

But I see something here --

Q Let me have it.

A -- in regards to taxable income.

Would that be the loss that I'm stating?

Q Can you identify the comment for item -- Line 28, which is for taxable income before net operating loss, of the year ending May 31st, '67?

A Then I have to amend everything.

Q Yes.

Would you correct that?

A For June 1st, 1966 to May 31st, 1967, the taxable income was, as a loss of $18,503.

Q Can you tell us what the income was on Line 28, taxable income, for the year ending May 31st, 1966?

A June 1st, 1965 to May 31st, 1966, the taxable income was $4,530.

JUDGE ROSE: Mr. Siskin, I see no purpose in him reading from documents that are in evidence, do you?

MR. SISKIN: I'm going to ask him the reason for the losses, Your Honor, to break down the factors entering into the losses.

Q (By Mr. Siskin) Can you tell us what the principal reason was for the drop in gross volume between the two fiscal years?

Do you know the principal reason?

A The principal reason would apply to that particular bakery, as it applied to Bageltown, because all our shops involved the same particular problem at the same particular time.

Q What were those reasons?

A The loss of the -- gradual loss of wholesale business, the introduction of cheaper bagel into the market, whether it was frozen bagels or a new company coming into the business, and cutting our price structure, and that's about all I can say. It was a general trend.

Q Now, did this establishment service the wholesale trade?

A It did.

Q And where were those accounts located?

A In the Long Island area.

Q Can you identify some of the principal account?

A Gold Star Baking Company, Waldbaum's Supermarkets. Those are the principal accounts.

There were various -- we had a Bohack Supermarket Chain that we shared in the production of bagels for, with Far Rockaway Bagel. That cut us out, too.

Q If I was to tell you that the difference in volume was approximately a $100,000 from 295 down to $202,000, could you break down how much of that loss in volume was represented by wholesale accounts?

A I'd say practically all of it.

Q Did you have an interest in a corporation at the same time known as Far Rockaway Bagel Bakery, Ltd?

A I did.

Q Were you an officer of the Corporation for the same years that we're talking about here?

For the other corporations?

A I did.

Q What was your title?

A I think I was the president of this corporation.

Q And were you familiar with the books and records of that corporation for the subject years?

A I was.

Q Did you cause or assist in the causing to be filed, certain corporation income tax returns?

A I was.

Q And did you bring those returns here today?

A I did.

Q All right.

MR. SISKIN: I ask these be submitted individually for the corporation years ending March 31st, '66, '67, and '68, of Far Rockaway Bagel Bakery Ltd.

(Respondent's Exhibits 22-24 was received and marked for identification, as of this date.)

MR. SISKIN: I ask that these be introduced in evidence.

JUDGE ROSE: Any objection?

MR. APPELL: No objection, Your Honor.

JUDGE APPELL: Okay.

Respondent's Exhibits 22,23, and 24 will be received.

(Whereupon, the above referred to was received and marked Respondent's Exhibits 22-24 in evidence.)

Q (By Mr. Siskin) Now, can you tell us what the volume was, what the sharp drop-offs -- the reasons for the sharp drop-offs in volume were for Far Rockaway, between the years March 31st, '66, March 31st, '67 and March 31st, '68, and I'm going to show you these so you can refresh your recollection?

A Do you want me to read these off?

Q If you would, just the volume. Then you can explain why there was a drop-off. Just the volume, that's all.

A "April 1st, [illegible]5 to March 31st, 1966, gross sales, $267,111.

"April 1st, 1966, March 31st, 1967, 51 thousand --"

No. The wrong one.

Can you read back to me what dates I asked you about?

(Whereupon, the referred to question was read by the reporter.)

27 A "$143,094.

"April 1st, 1967 to March 31st, 1968, $51,695."

Q Now, can you explain the factors leading to the diminution of the business?

A There it could be that Bohack -- Duggan Bakeries were served there, out of that bakery, in '65 and '66, and that's when that was dropped.

I think the Bohack order, Supermarket order, was in that bakery, and that was dropped.

Plus the Waldbaum Chains that were dropped subsequent to that, in '66 and '67 period.

Q Did the ethnic nature of the neighborhood change, and was that a factor?

MR. APPELL: Objection, leading.

JUDGE ROSE: Overruled.

Try not to lead, Mr. Siskin.

A With regard to Far Rockaway Bagel Bakery, we had moved that bakery in 1964, I think it was, from a previous location, which was in Rockaway Beach, also. We had moved that bakery from 66th Street in Rockaway Beach, into the Far Rockaway area, which is just a couple of miles away, for the particular reason that that whole general area, of Averne had become a rehabilitation or, I think it was a Project I area.

All the buildings in that particular area, all the bungalows of that particular area, the summer customers, had changed with regards to the nature of our summer business, and our year-round business, and we moved into the Far Rockaway area to make the necessary change, to maintain the location in that area.

Q And can you tell us not withstanding that move, what if any other factors also were pertinent to the reduction in volume, besides the loss of wholesale accounts.

A The general loss in business in general, because of competition on the outside.

Q Now, did you try to negotiate with these accounts that you've just alluded to, other than the once that you've previously alluded to, with respect to loss of business?

Try to retain the business?

A I couldn't allude to have any meetings with the account, like the Duggan Brothers. They went out of business completely.

With Bohack, they refused to speak to me at all, because they had made a contract with an outside source whom I don't know, but they told me they had a contract and they couldn't buy bagels from my anymore.

With Waldbaum, the same position applied to Waldbaum as it did to the other bagels, with regards to not being able to meet the competitive price.

Q And did you make this position known to the Union?

A I did.

Q Do you know who you spoke to at the Union, at the time?

A Well, there was a Mr. Harold Laskowitz who was the delegate of the Union at that particular time.

But during the course of that period of, I'd say in November and December of '66, and in Jaunary of '67, in the course of our meetings with regards to trying to negotiate a contract, there were other people involved.

There was a Morris Amster, whom I spoke to, Mr. Larry Horowitz.

I believe there was a Mr. Sammy Greenspan at the time, too, who was on the negotiating committee.

And a Mr. Morris Skclnick, who at that time in 1966 and 1967, in January, was a member of the negotiating committee, and a past president of the Bagel Bakers Union.

We tried to arrive at somw applicable solution to this problem, which we never could do.

Q Now, can you tell us what the decrease in business meant with respect to your bagel requirements?

That is to say, would a corresponding -- would a decrease in volume, in the selling end, automatically result in a decrease in volume in the amount of labor that you needed?

A Without question. Without question, because everything was based on the production basis, with regard to the number of help needed.

It was known in the Union the amount of boxes that we had to produce in each shop, each day, and they would send the men accordingly.

Q And would it be fair to say that if production -- that if --

Withdrawn.

Would it be fair to say that if volume decreased 80%, labor requirements would decrease 80%?

MR. APPELL: Objection, leading.

JUDGE ROSE: Overruled.

A With regards to -- it would work in that particular ratio, in that formula.

Because everything was based on production.

Q And did you advise the Union delegate of the decreased need for labor, prior to the lockout?

A I wouldn't have had to tell him that, because the men themselves would have told him that.

The only time I was able to tell him that, in that period, prior to the 19 -- February 1st, 1967 date, was, I was meeting with him practically everyday, and I was telling it in general to the whole Union committee at that time.

Q Now, did there come a time when you showed any of these

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financial figures to anybody at the Union?

A I faintly recollect that these were sent to the Union also. I think it was required, I think during the course of some litigation.

I'm hazy on that, though.

Q And do you recall whether the Union attempted at any point, prior to the lockout, to reduce the labor cost in any way?

A No. They did not.

Q Did you ask them to?

A We did.

Q Do you remember who you spoke to?

A_ As I said, this was part of the negotiations of the contract time at that time.

Q Now, when you mentioned Waldbaum's or any of these other accounts, were they the accounts of the respective stores collectively?

Did you have the same account at each store, or only one of the stores, when you mentioned Waldbaum's?

A I had an aggregate amount of 17 or 19, I'm not too sure of the exact figure, the number of stores involved, that were divided amonst our particular three bakeries.

Q The Waldbaum's?

A The Waldbaum Chain.

Q Would you say, to your knowledge, you were one of largest suppliers?

A I would say so.

Q Now, was the buying for -- of bagels by these Chain stores, handled by a central buyer, or was it handled by an individual store manager?

A The institution of the approach to selling bagels to a Waldbaum's store, had to go through a central buyer, and he allocated the stores to the particular bagel supplier, and from then on it became the -- the province of the store manager to require an increase or a decrease in the number of bagels he needed.

Q Who was that buyer that you negotiated with?

A Morris Pitt.

Q Now, did there come a time when you had to take or took back employees after the lockout?

A Yes.

Q Can you give us that date in point of time?

A It was February -- Febraury of 1968.

Q And do you recall who came back to work?
Who was selected by the Union to come to your shop?

A In which particular shop are you talking?

MR. APPEL: I object to the form of the question.

JUDGE ROSE: Sustained.

Q Do you recall who came to your shop?

A Which shop are you speaking of?

Q For each of the shops.

Do you recall of your own knowledge at this point?

A In Island Park, I happened to be there at the time of the onset of the time of the bakers who came back.

The delegate and his secretary came to the bakery at 6:00 o'clock in the morning, I remember that, and he showed me the Court Order that he's sending a man, or the men back to work.

And he sent in a man by the name of Neil Kleeger. K-L-E-E-G-E-R.

And this man came in and he asked me what do I want done. The delegate was there at the time. I told him make the dough, and we'll bake some bagels.

But this Neil Kleeger had not been a previous employee of ours at all. That was in -- that was the first day of the return of the Union to our shops in February.

In Levittown, I think a man by the name of Hy Ustin came back at that particular time, and he also approached us, what do we want him to do.

We told him what to do, and he started to do his work.

In Far Rockaway, Mr. Sam Cutler came back to work, and the same procedure followed. He asked us what we wanted him to do, we told him, he did it, and he made

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his work.

Can I offer any further information without being asked?

Q No.

Just answer the questions.

Did -- were there a group of employees that came back to each shop?

A Not at one time.

They seemed to be straggling in, because from the subsequent procedure that followed, in Island Park none of our steady men ever presented themselves for availability to work, or did they come into work under this particular Order.

And we had different men showing up at different times and different days, without our even knowledge, because the delegate said that he would send certain men at certain times, and he would call us up later in the day and he says I'm sorry, I can have anybody for you, do the work yourself.

That applied to Bageltown, also.

And but in Far Rockaway, Mr. Sam Cutler came, when he was sent, because he was -- he worked there prior, and he came, and he knew what to do.

MR. APPELL: Sam who?

MR. SISKIN: Cutler.

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Q (By Mr. Siskin) Now, will you tell us what the production was in point of percentage, production requirements were, in point of percentage, at the time in February 1st, 1968, that you're referring to, as contrasted with the time prior to the lockout in February, 1967?

A That I couldn't tell you off the top of my head.

But there was enough work just for one man, in February of 1968. For one man, and I doubt if we ever had two men working at all. Just one Union man came in.

With a kettle man.

JUDGE ROSE: Where is this, excuse me?

THE WITNESS: This is in Island Park.

JUDGE ROSE: Okay.

A One man, Neil Kleeger came in, with a kettle man. And they made bagels and they baked the bagels necessary for that day's production.

I believe it was on a Saturday. The same thing applied to Levittown.

Hy Ustin came in. There was only enough work for him. He made as much work as he wanted to, and he had a bit of a problem, because he had a time limit.

And the reason why that's so fresh in my memory, is because I ran a little diary on him at the time it happened, that he had to leave at a certain time.

And in Far Rockaway, Sam Cutler, he did whatever was there for him. He stayed there.

Q How about Bageltown?

A I just mentioned Bageltown, with Hy Ustin.

Q I see.

Were there any complaints --

JUDGE ROSE: Excuse me, just a minute, Mr. Siskin.

I'm sorry, but the record now, at this point, I think is somewhat confused.

You're a principal in four bakeries?

THE WITNESS: Three, sir.

JUDGE ROSE: You said Levittown --

THE WITNESS: I meant -- you're right, Your Honor.

Your perception is very good.

We refer to Bageltown as Levittown, being that it's in the town of Levittown.

My error, not your.

JUDGE ROSE: Okay.

There's also one listed here as Laurelton.

Okay.

Q (By Mr. Siskin) Now, were there any complaints by these employees following the lockout, to you or to your recollection, to any of your partners?

A No. No complaints at all.

Q Did they complain about less work or more work?

A Not to me they didn't.

Q How long did they stay at your shop and work?

A The individuals mentioned didn't stay too long.

They stayed one or two days, and then they took off and went somewhere else, and we had different men coming in, whom the Union sent at their prerogative, without any request on our part, and without any chance for us to say we didn't want that particular man.

They just sent the man in, and when ever a man showed up for work, we asked him what he wanted to do, how much he wanted to do, and whatever he did, he did.

Q How long did that last, after they returned to work?

A There were different periods of time as to the termination of that bit. Some lasted through April of 1968. Some up until the early part of April of '68.

I'm not too sure about that, but I can check that as to when it stopped, according to our checkbook.

Q Were you ever advised by the Union, that they would not send men back again?

A No.

Q Did you ever prevent any Union men from working at your shop, after the lockout ended?

A No. Not at all.

If the man presented himself for work, he always had work.

Q Did there come a point in time when you ever did any work in these shops?

A Yes.

Q When was that?

A In 1967. During that lockout period.

Q Okay.

In 1968, after the lockout ended, February 1, '68, did you ever do any of the work?

A I did work when the Union man would come in, couldn't do all the work that was there, and he said he had to go somewhere else, we finished the work.

Q Now, did there come a time when you ever got back any -- since the loss of the wholesale accounts, or the chain store accounts, did you ever get back any of these accounts, to this date, even?

A Not to this date even.

Q Did you make known the loss of any of these accounts, to the Union?

A I made known these particular loss of these particular accounts to the Union, in the course of our negotiations as to the process of our losing them, and subsequent to the lockout, and then the return in 1968 of the Union.

We told them we had no wholesale, and they sent the men accordingly in to the amount of production in the particular shop at that time.

Q Okay.

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Is it fair to say that these wholesale accounts had been lost prior to the lockout?

A They were in the process of being lost.

MR. APPELL: Objection. Leading.

JUDGE ROSE: Overruled.

A They were in the process of being lost, and after having tried to come to some amicable agreement with the Union, where I could hold on to them, and I couldn't, they were lost.

Q Well, the Duggan's account was lost.

When was that lost?

A I think '64 or '65. I'm not too sure about that.

That can be verified easily enough, because they did go out of business.

Q Did you have any wholesale business left at all?

A A very small --

Q Prior to the lockout ending?

A Yes.

Q All right.

When did you lose the major -- could you pick a time when you lost the major portion of your wholesale accounts?

A I would say that it would be as of February 1st, 1967, because the Teamsters didn't come into work anymore, and I had no more deliveries to be made.

Q Do you know when the Teamsters did not come in to

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work anymore?

A February 1st, 1967.

Q And at that point, had you lost the major wholesale accounts that you had?

A At that time I lost the major wholesale accounts.

Q Prior to that time?

A Prior to that time.

Q Now, did you notice any trend or -- in your travels in the bagel industry?

Did you notice any trend towards mechanization of the industry, prior to the lockout?

A I have no personal knowledge of that.

I can only go by what I heard during the course of negotiations, as to what the Union was trying to do, with a particular entity that was opening.

Q Did you know what the Union was trying to do to a particular competitor?

A From what I gathered, at that particular time, they were trying to unionize them. On a machine basis, but I don't know anything further than that, because I would have no knowledge on that.

It was a Union problem.

Q Do you know the name of the shop that was involved?

A I was given to understand it was W & S.

MR. APPELL: I move to strike, Your Honor, on the ground that it's hearsay.

JUDGE ROSE: Sustained.

Q (By Mr. Siskin) Now, did there come a time when the Union and you spoke about mechanization?

A No.

Q Did there come a time when the Union and your corporations discussed the possibility of meeting any of this new competition?

A Only in the course of the negotiations of the contract.

Q And can you pick a point in time?

A That would be from, I would say, from October right on through January of 1967.

Q Now, did there come a time when you took any measures at all to meet the losses that were occurring in this -- in these businesses?

Did you take any remedial action, as a business man?

A I don't know what period in time you're talking about.

Q At any time during these periods of losses, what remedial action did you try to do, to stem the losses that were occurring in the financial situations of your company?

A To make --

MR. APPELL: Objection as to form, Your Honor.

He has testified he has more than one company.

Q (By Mr. Siskin) As to each particular company?

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A I don't follow the question.

Q All right.

As to each company, can you recall what affirmative action you took to prevent the losses from continuing?

A I tried to consolidate my maintaining a price structure, by trying to find new customers, by, as I stated earlier, in 1965, as regards to Bageltown, I had made a move to get into the retail area of the baking industry. But it would have to be a gradual, long-term effort on a retail level, to mitigate these losses.

Q Now, you mentioned with respect to Bageltown, that there had been a change in the nature of the company.

Can you tell us what that change was?

A Mr. Morris Skolnick came in, in 1967, January -- February 1st of 1967, he became a partner.

Q And was that the change that took place?

A That's the change that took place.

Q What --

A As far as the --

Q What happened with the day to day operations?

Did they continue the same as before?

A No, they didn't.

Q What was the difference?

A That we had no wholesale, and we worked ourselves.

Q I see.

43

And was that the change that you were referring to before?

A That's the change I was referring to.

Q That's with respect to Bagel --

A Bageltown.

Q The Levittown store?

A Yes.

Q Now, to your knowledge, was this decrease in volume in the wholesale accounts, characteristic of the entire hand-craft industry?

A I would say --

Q During this period of time?

A I would say it was, because while we were negotiating contracts, we were all negotiating for the same particular purpose, to try to mitigate losses, and try to get help from the Union, so to speak, to maintain the status quo, as we had in the past.

Q Now, during these period of losses, as reflected by these financial statements that are incorporated in the Tax Returns that have been made exhibits herein, did the financial condition of your company's deteriorate?

A The first part?

Q During these periods of time reflected by these Tax Returns, did the financial condition of your company's deteriorate, of these three companies?

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A At the time of these particular --

Q These three years?

A I think they speak for themselves.

Q Did that result in any cash crunches, or any cash squeezes for the companies?

A For the individuals involved, we took -- our salaries were cut.

Q Now, did you also attempt, in any way, to get new capital for these companies, or undertake to put new money in?

A That's why we took the partner in, in Bageltown.

Q Now, did you owe substantial amounts for Welfare Funds?

A Yes.

Q By -- by these corporations?

A We did.

Q That existed prior to the -- prior to the lockout, did it not?

A It did.

JUDGE ROSE: Excuse me, Mr. Siskin, when you say, "Welfare," you're referring to the vacation and holiday fund for the Union?

Money that you would --

You're not talking about State Welfare, are you?

THE WITNESS: No, no.

It was vacation and holiday, I believe it was.

JUDGE ROSE: Okay.

THE WITNESS: It was Pension Funds, I'm sorry.

Q Pension?

A Pension Funds, yes.

Q (By Mr. Siskin) Now, can you explain to us how the box method of payment for bagels worked in the industry?

A For salary?

Q Yes, for salary.

Q Well, a man would come to work, and he would be told that there were a number of boxes to be made. There were usually two men working, plus a man who would do the baking. And that would be -- there would be to have to guarantee of that particular three man team for a hundred boxes of bagels in the bakery.

Anything above that was at the Union's discretion as to whether they would allow these particular men to make the overtime, or the Union would say that, well, there's enough work there, to send a fourth man in, which would -- which was, at that particular time, called a single job.

Now, they were paid on a -- the per box method, meaning they would get, I think it was 28¢ per box, with a minimum guarantee of $28 per day, for working at the bench, and $29 per day for working at the oven.

The kettle man, I think, was at a base rate pay per 8 hours, for 1967, $19.67 per day, plus $2.46 per hour, 46 if he worked overtime. Each man.

MR. APPELL: Excuse me, Your Honor, Mr. Skolnick is talking to the witness.

JUDGE ROSE: Okay.

Well, that's --

THE WITNESS: We'll stop that.

JUDGE ROSE: This witness is fully capable of testifying for himself, I'm sure.

MR. SISKIN: We're going until 5:30, Your Honor?

JUDGE ROSE: I thought we might.

Q (By Mr. Siskin) Now, is it fair to say that in addition to a labor sales correlation, you could also utilize a purchase to sales comparison in determining the effect of decreases or increases in volume, in this industry?

A I'm sure that it could be done, but you'd have to be a CPA to be able to do that.

Q Okay.

But you could --

A You could.

Q Could we construct a direct correlation between sales and -- and purchase of flour, the same as you could between sales and labor?

Isn't that a fact?

A That's right.

47 But there would be a lot of figures to be taken into account for that, yes. It could be done.

And the number of bagels produced from the sack of flour. It would all have to be correlated.

Q Now, your rent during the period that the volume decreased, stayed the same, did it not?

A No, it went up every year.

Q But it didn't go down?

A No.

Q So that in effect, the rent during the period of any decrease in volume, became an enormously higher comparative percentage of cost of your sales volume, did it not?

A Yes.

MR. APPELL: Objection.

JUDGE ROSE: What is the relevance of that, Mr. Siskin?

MR. SISKIN: It goes to your overhead.

That's one of our affirmative defenses.

JUDGE ROSE: So what?

MR. SISKIN: It goes to the cost construction, Your Honor.

If rent stays the same as a percentage of cost, it's one thing. The shops can afford to sell at a cheaper price.

48 If the rent stays the same as a fixed cost of your percentage of volume, your per bagel rent cost, so to speak, becomes a very pertinent consideration. It's a cost that cannot be reduced.

JUDGE ROSE: It becomes pertinent to what?

MR. SISKIN: To a comparison of whether this company was financially able to stay in business, if these labor costs had been paid, and if they had been able to circumvent or overpower the competition.

These are costs that cannot be rectified, Your Honor.

That's our contention, that's our defense.

JUDGE ROSE: I think that is very vague testimony on a very iffy question, Mr. Siskin.

However, I'm going to allow it to stay in the record.

MR. APPELL: Your Honor, it is also an extremely leading question, and it's asking the witness for a conclusion.

JUDGE ROSE: Well, I don't worry too much about that, at this point.

Overruled.

Q (By Mr. Siskin) Did any other costs stay the same or shift, during this period of --

A Well, there was always a shifting of the price of flour, up or down.

But other than that, taxes went up.

Q Did heat, light and power go up or down?

A Always went up.

MR. SISKIN: I think that will be all for today, Your Honor.

Can you recess at this point?

JUDGE ROSE: Okay.

Any objections to that?

MR. APPELL: None at all, Your Honor.

JUDGE ROSE: We'll be in recess until 9:30 tomorrow morning.

Let's start promptly on time, shall we?

(Whereupon, the hearing was recessed at 5:30 o'clock p. m.)

I don't know the price, but they bought bagels from other bakeries and they, in turn, delivered to the customers that I had previously had.

Q Is it fair to say that at that point in time, at the time the Teamsters were making the stops, so to speak, that the allegiance of the accounts were to the Teamsters rather than to the bagel shops?

A There is no allegiance to me any more, as long as there was no allegiance to me any more.

Q Can you fix a point in time when that developed?

A It was directly post-February 1st, 1967.

Q Do you recall where those or what was the name of that Union?

Do you recall the name of the Teamster Union?

A Local 802.

Q What was the direct effect of 802 making the stops and buying the bagels?

A That they took care -- they serviced the customers and I had no further outlet to service any more customers.

Q Was that with respect to the wholesale accounts?

A Only the wholesale accounts.

Q Now, what was the direct effect of the loss of a wholesale account on the payrolls of your shops?

A I don't follow that question.

Q Well, when the wholesale decreased, what was the effect upon the payrolls of your shops?

Was there any correlation, the payrolls for the Unionemployees?

A The only correlation I could make would be in February of 1968 when the Union came back and when the Union came back the man who worked there -- I only had enough work for one man.

Q As contrasted with --

A As contrasted to three men and possibly overtime with an extra man on the weekend.

Strictly speaking, our business is a weekend business.

The bulk of our operation is usually Friday, Saturday and Sunday and if there is any overtime to be made it was always on those particular days.

That is where most of the work was made.

Q Were you familiar with almost all of the Union employees prior to February 1, 1967, this particular Union?

A I had a long relationship with this particular Union.

Q That was true for almost all the employees in that Union; isn't that correct?

MR. APPELL: Objection.

JUDGE ROSE: Oh, Mr. Siskin, don't lead the witness. Just ask him direct questions.

A Which one?

Q Bagel making or bagel baking machines?

A Bagel baking machines is a revolving oven.

We had revolving ovens at that time but we did not have a bagel making machine at that time.

Q Did Island Park introduce any bagel baking machinery in 1967 or '68?

A No.

Q And Bageltown, did they introduce any machinery for the baking of bagels in 1967 or '68?

A No.

Q What percent of your business in 1966 in each of the three companies or any of them was with Walbaum's?

A I'd say about 10 percent.

Q Can you specify which companies?

A I would allocate 10 percent of each of the companies to the Walbaum chain.

Q Each company did business with Walbaum's?

A Yes.

Q About 10 percent?

A Yes.

Q After you lost Dugan's did you cut down on your number of employees?

A No, we cut down on the number of boxes of production.

MR. APPELL: I move to strike the answer

after the word "No," your Honor.

JUDGE ROSE: Overruled.

Q (By Mr. Appell) You maintained the same number of employees?

A Yes, sir.

Q What percent of your business was derived from Walbaum's in 1967 for each of these three companies?

A None at all except for that first month.

I don't think we had any Walbaum's at all in January of '67.

Q Did you have any business with Walbaum's in January '67?

A It is a hazy area right now because that was the time I was told they were going to discontinue.

I may have had them for one week in January, '67 but I know by the end of January, '67 I did not have them.

Q Is it fair to state that you lost Walbaum's about the same time that the Teamsters stopped making pickups at your establishments?

A That is not a good question because the Teamsters did not make pickups.

They worked for us, the Teamsters.

Q All right, let me rephrase it.

Is it fair to state that the Walbaum's accounts ceased at about the same time that the Teamsters stopped working for you?

A Within an area of a week or two possibly.

Q Can you recall now which came first?

A I think Walbaum's ceased prior to January 31st, 1967.

Q To your knowledge did Walbaum's have knowledge of your companies or the Bagel Bakers Council labor differences with the Bagel Bakers Union?

A Not to my knowledge.

I wouldn't know what they knew.

Q You never told Walbum's that you were having negotiations or anything like that?

A No, I never had any contact with Walbaum's other than that first contact with a Mr. Morris Pitt who told me what stores to deliver and what deal I could make with that particular store with regard to merchandise presented to them.

Q What business did you serve Dugan's at?

A Having three bakeries we split the Dugan's order into two of the three bakeries.

I think it was in Far Rockaway and in Island Park.

Q When you lost Dugan's what was the change in your output, if you can recall?

A I'd have to check with my partners who were involved in the Far Rockaway bakery and the Island Park bakery to refresh my memory.

Are you talking percentage-wise?

Q Well, the number of boxes.

You said there was a restriction.

A There was a reduction in the number of boxes.

I would have to figure that out.

I would have to recollect the amount of bagels that Dugan's took at the particular time which could be -- I may get that information to you, sir.

Q Who did work for Herman Star Bakery?

A That came out of the Bageltown shop.

Q What percentage of Bageltown's work was that in 1967, that account?

A In 1966?

There was an aggregate amount of about four to 500 dozen bagels a week.

That would be broken down into boxes, over a 100 boxes of bagels a week.

Broken down on a seven-day basis you would have to figure that out for me.

That would be the reduction in production.

Q What would be the reduction?

I don't understand.

A Breaking down the number of dozens of bagels on a per box basis would be the number of boxes of bagels less that the particular Union men would have for their salary.

I think 468 dozen bagels represented 100 boxes and 100 boxes was $28 per day, and 100 boxes was divided by $28 a day reflected the salary of three men each.

That would be a reduction in their salary for the week of at least $28 for the week.

Q How much time was actually spent by the men in putting out a 100 boxes?

A Now, you are reflecting on three particular men.

Q Yes.

A Two worked at the bench and one worked at the oven.

The time spent baking a 100 boxes at the oven depended on how fast the man wanted to work at the oven because, as I mentioned earlier, these were now automatic ovens and all you had to do with those particular ovens is to put the bagels on to the shelves and turn the bagels off the boards.

On the bench it depended also how fast the men particularly worked.

There was no set time to say that they had to work eight hours in order to produce a 100 boxes of bagels.

It depended on their speed or lack of speed reflected on the hour.

Q What would the average be, do you know?

A I know, because I was a bagel maker and a bagel bakery.

The average would be about 12 boxes per hour per man, the average.

Now, that is eight times eight.

I am going to get into the involvement of eight times eight which had to be broken down to seven lines to a box.

Q Seven what?

A Seven lines of bagels to a box.

There are 64 bagels in a box but their salary was based on 56 bagels in a box.

When I say 12 boxes per hour per man it meant 64 bagels in a box, that would be average.

On a 100 boxes there were two men making, that would make it an average 24 boxes per hour for a two-man team.

As far as a 100 boxes were concerned, conservatively speaking, most that it could take would be 4-1/2 hours.

Can I go off the record for a minute, your Honor?

JUDGE ROSE: What for?

THE WITNESS: I want to point out to two gentlemen up here who used to make more than that per hour, just to make a diversionary remark, that is all, as far as speed is concerned.

JUDGE ROSE: Well, let us go on.

Q (By Mr. Appell) So the most it took or would take to make a 100 boxes is four and a half hours?

A Less than that to bake it because you can bake close to 30 boxes an hour at the oven.

Q How much work did that lose for the men let us say when you lost Herman Star Bakery?

A For the week, as I stated earlier, a 100 boxes for the week.

Q Did any of these three companies gain new customers in 1966, '67 or '68?

A No, sir.

MR. SISKIN: Your Honor, objection.

Gain new ustomers?

You mean wholesale or retail?

THE WITNESS: Makes no difference.

JUDGE ROSE: Just a minute.

THE WITNESS: Sorry.

MR. SISKIN: He is talking about two different kinds of customers.

JUDGE ROSE: It doesn't matter.

Overruled.

Q (By Mr. Appell) The percentages that you gave for the wholesale drop, 30 percent, 45 percent, what do you base those percentages on?

A On the gradual loss of customers as I stated earlier.

Q What is the source of those percentages?

How did you figure them out?

A Well, I gave you that 10 percent for Walbaum's and for Herman Star I didn't -- I don't know the percentage offhand, and for Dugan's.

There are others besides that with regard to Big Apple Supermarkets, Gold Star Bakery, Bohacks Supermarkets.

Q How do you reach a conclusion of 30 percent and 45 percent?

A I'm just approximating it.

I don't know exactly, but it is approximately that.

Q You had no definite figures on which to base that statement; is that correct?

A On reflecting this on three bakeries which were across the board it became a general trend and I stated that for Walbaum's it was 10 percent, Herman Star and Gold Star who are big wholesale bakeries took the bulk of their business -- let me see if I can break it down.

Gold Star was approximately the same amount of bagels as Herman Star.

Big Apple I think was a 5 percent reduction.

I would say there would be a 10 percent as far as Herman Star and Gold Star and Bohacks was definitely a 10 percent reduction.

That is why I approximate 30 percent.

Q When did you lose Bohacks?

A In 1966, the latter part of 1966.

I don't know where that --

Q That was before the lockout?

A Before.

Q How about Gold Star?

A That was right at the time of the lockout.

Herman Star was earlier.

Q When you say right at the time you mean at the same time that the lockout started that you lost Gold Star?

A I had a reduction in Gold Star the first three weeks of January and then it was dropped completely.

Then they cut me out completely.

Q Do your business records show that?

A If I can find the business records.

If I can find them.

Q When did you lose the Big Apple?

A Big Apple was in 1966.

I'd say in July or August of '66.

Q How about Dugan's, that was about '64, '65?

A I think.

I may have been mistaken because in checking further with my partners who were directly involved with Dugan's they tell me it was in late '65 and early '66, some time in that area.

Q What is your best recollection?

A I would have to defer to their recollection because they were directly involved in it.

Q What is your best recollection?

A '65 and '66.

Q Did you terminate your relationship with Bohacks or they with you?

A They with me.

Q Did they tell you why?

A They were getting it from another source.

Q How about Gold Star?

A Gold Star was getting it from another source.

Q Is that what you were told?

A That is what I was told.

Q Who told you that?

A The owner of Gold Star whose name is Sidney Kirschman.

Q Now, in the cases where you lost Bohacks, Big Apple, Gold Star, Hermans, Dugan's, did you actually reduce the number of employees?

A The only reduction in the number of employees were the relief men that used to come in to work one day or two per week based on the amount of production that we had.

It evolved that the people who worked in our shops steadily either took an extre day's work on themselves or they incorporated and instead of working in a set of three, they worked in a set of two.

Q In which shop did you change from three men to two men?

A I think it worked out in all three shops for the days of the middle of the week, Monday, Tuesday and Wednesday.

Q Which were the men that stopped working regularly?

A Which of the men that stopped working regularly?

I would have to check some records that I have.

I can get that information for you, I think.

Q Did any of your wholesale customers ever specifically tell you they were getting frozen bagels instead of yours?

A Walbaum's.

Instead of mine?

Q Yes.

A Not instead of mine but in conjunction to mine which cut their request for more of my bagels.

Q They specified frozen bagels?

A Yes.

Q None of the other ones did?

A What do you mean by none of the other ones?

Q None of the other wholesalers, none of the other retail chains that you lost told you it was because they had frozen bagels?

A No, none of the others.

Just Walbaum's.

Q Isn't it a fact to your knowledge that when Walbaum's began using frozen bagels, as you stated, it was in conjunction with regularly baked bagels?

A Yes, because they use those frozen bagels in their Freezer Department, and our bagels are their Appetizing Department.

Q So you have no knowledge that the use of the handling of frozen bagels by Walbaum's in any way diminished the number of regularly baked bagels that Walbaum's now were selling?

A I do have knowledge of that.

Q Do you have knowledge?

A I have knowledge of that by the fact that the Bagel Bakers Union, realizing that this was a threat to their production which had become by the reduction in the amount of work that the men were making, decided to picket the Walbaum's Stores.

Q Did you ever see that picketing yourself?

A Yes, I did.

Q Aside from the picketing do you have any knowledge that Walbaum's actually reduced the number of regularly baked bagels that it was providing?

A I can only state from my own knowledge with regard to the Walbaum's Stores that I delivered to that their orders were cut in half practically.

Q How do you know that?

A From the amount of bagels that they took from one week to the next.

Q From you?

A From me.

I can only speak for myself.

Q When you were cut out from Walbaum's to the best of your knowledge, Walbaum's continued to service that same amount of regularly baked bagels?

A I didn't hear the question, sir.

Q When Walbaum's ceased doing business with you, did Walbaum's to your knowledge continue to get regularly the same number of regularly baked bagels from another source?

A I have no way of knowing because I never went back to Walbaum's.

Q Now, during 1967, after the lockout who, if anyone, Q When would you say the major amount of your wholesale for these three companies was lost?

Would that have been in February '67?

A When you say major, what percentage are you talking about?

Q I'm asking you.

A Major could be 75 or 80 percent or 51 percent.

Q Well, would you say you lost over half your wholesale business that you did lose in the period you described in February '67?

A I would say so.

Q What percent would it be, would you say?

Would it be 70 percent, 80 percent?

A In February of '67?

Q Yes.

A Post that particular day?

Q Yes, after February 1st?

A In conjunction with the amount that was lost prior to February 1st I would say 70 percent.

Q Is it fair to state that the main reason why you lost those accounts after February 1st was because the Teamsters weren't working for you any more?

A It is fair to state.

Q Your shop never closed down after the lockout, is that correct?

All the shops stayed open?

A Yes.

Q What kind of funds did you owe the Union before the lockout started?

A I think it was pension and welfare.

Q What did the welfare payments go to, what kind of benefits?

Was that for medical?

A I don't know.

It was an insurance fund.

MR. SISKIN: Objection.

That is a Union benefit.

He just made the payment.

He had no knowledge as to what the sources or what the revenue was applied to.

His knowledge was as a payor, as an Employer.

JUDGE ROSE: Very well, sustained.

You can ask him what he paid, Mr. Appell, and what it was denominated to be.

Q (By Mr. Appell) What contributions did you make from each of these Employers to the Union and its various funds in 1966?

A It was based on a per box basis.

I don't recall exactly what the percentage of that per box basis was allocated for that particular fund, I don't recall at this time.

Q This machinery of the Thompson Company, when was that first produced?

A Oh, I don't know when it was produced first, but the first knowledge that I had of it was in 1965, '66.

Q You didn't know how long it might have been around the New York area before then, before you found out?

A Not to my knowledge, I don't know.

Q Did you ever see the bagel making machine that Throggs Neck had?

A No.

Q What is the source of your knowledge of that?

A The conversations I had with the particular Bagel Bakers Union men who worked in my particular shop.

MR. APPELL: Your Honor, I would move to strike the witness' testimony insofar as it asserts that Throggs Neck did have a bagel making machine on the grounds the testimony is based on hearsay.

JUDGE ROSE: Sustained.

MR. SISKIN: I object, your Honor.

The witness has testified he knew of his own knowledge that that was the case.

It was accepted knowledge in the industry, it was knowledge to this witness.

He testified it was the knowledge in the industry.

at Throggs Neck?

THE WITNESS: I was never in Throggs Neck.

JUDGE ROSE: Objection sustained.

Q (By Mr. Appell) Are you aware of any direct affect that the opening of Bagel Bakeries in East Meadow and at Bagel City, the direct affect that had on your businesses

A With regard to Bagel City, they were very close to our particular bagel bakery in Levittown which is Bageltown and they started what we called in the trade raiding our customers.

If they didn't take our customers away they undercut our price so that we had to meet competition by lowering our price.

With respect to the East Meadow Bagel Bakery, he was involved with the taking -- with our loss of the Big Apple Supermarket chain.

Q Who made the determination that you only had enough work for one man per shop when the men came back to work in February '68?

A Are you speaking about any particular day of the week?

Q No.

A Well, there was a difference of the day of the week that would reflect the amount of work that was available

Q Who made the decision that only one man would come back rather than three?

A It wasn't a decision that was made.

The Union sent people back to work and they only sent one man.

There were days that the door was open available for people to come back to work where nobody showed up.

Q Didn't you through the Council or directly inform the Union of the number of people you wanted back?

A No, I told the Union representative how many boxes of bagels I needed for a particular day and he sent the men accordingly.

Q What you are saying is there was no discussion as to how many men would come back?

A The discussion only was based on the number of boxes that we had available.

That was always the case.

Whether it was post-lockout or prior-lockout.

Q It is your testimony that the men who came back to your shops then refused to return to work any more?

A Individuals did.

Q Did they tell you why they weren't coming back?

A The few conversations I had with them at that February 1968 period is that they were coming to work other work somewhere else.

They were just sent to fill in time.

Our steady people in two of the bakeries did not return to us.

Only one of the bakeries did the steady man who was there prior to 1967 come back to work.

Q Did you directly or through the Council make any request of the employees of these three companies to return to work?

A I never had to.

I never spoke to any employee directly as to who should be designated worker in our particular shop.

Q So your answer is no?

A No.

Q Did you ever have employees in those three shops who were not members of the Union other than yourself and your family and partners?

A Please?

Q Yes, did you ever have employees who were not members of the Union?

A Yes.

MR. SISKIN: Objection.

Will you specify the years?

MR. APPELL: My next question is when.

A Well, we had non-Union members, non-Union people working for us all the time.

With regard to what kind of work?

Q With respect to bagel making and baking?

A We had no people like that at all.

Q How about the kettle men?

A Kettle men we had.

In February, specifically in February, 1968 the Union would send in a man to be a baker and he would also send a kettle man, the delegate would.

But there were times when the delegate would call up saying "We have no kettle men," we had to provide our own, which we did.

Q What Union delegate would tell you he couldn't provide you with a kettle man?

A At that particular time it was Harold Laskowitz.

Q It is a fact, is it not, that the Bagel Bakers Council finally did conclude a contract with the Union in about September 1968?

A Yes.

Q Isn't it a fact that that contract helped meet the problem of the need to reduce labor costs?

A No.

I don't know how that would follow.

that would help meet your problem of having to reduce labor costs?

A Well, not in that sense.

We signed a contract with them and we told the people to come back to work.

Whoever came back to work came back to work and that was it.

No reflection as far as our wholesale business was concerned.

Q Did the contract result in lower labor costs?

A No, it didn't, because we didn't deliver any more wholesale.

We never delivered wholesale.

Q I'm talking now about the labor costs as opposed to whether you got wholesale back or not.

A Well, if I remember correctly the price per box through a particular man was the same.

I don't know what labor costs you are talking about having been a reduction.

Q Didn't the minimum wages for the different job classifications go down in the '68-'69 contract?

A Not to my knowledge.

Q Weren't contributions to the welfare fund, vacation fund reduced?

or October 1st of 1968, instead of paying the vacation and holiday to the Union we paid it to the individual man himself as he presented himself for work.

Q This did not result in lower costs, net costs to you?

A It may have on the overall picture as compared to 1968 based on production.

MR. APPELL: Your Honor, I have no further questions at this time.

I would reserve my right, if I could, to question the witness with respect to any and all records that are produced pursuant to my request this morning.

JUDGE ROSE: Very well.

We will take a 15-minute recess.

(Whereupon, a 15-minute recess was taken.)

JUDGE ROSE: On the record.

MR. APPELL: Your Honor, during the off the record discussion I had occasion to examine records that were shown to me by a gentleman named Sol Segar who says he is President of the International Bagels, Inc.

He produced some records which purport to be various types of employee earnings records for 1967.

I will stipulate that Form 941-A, submitted by International Bagels, Inc. to the U. S. Treasury Department, the previous steady men ever come to work for any of these shops?

A Only in the case of Island Park in October of 1968, Mr. Larry Horowitz came to work there on a one or two day basis per week up until the end of that year, I believe, having been a steady man in our Bageltown shop.

Q Now, would you call this industry a piece work industry, the handcraft industry?

A A piece work, yes, indeed.

Can I expand on that?

Q Yes.

A In the sense that it was not particularly a one piece media, one bagel called a piece.

It was on a per box basis, meaning 56 bagels to the box, but it would be a piece work, one bagel at a time.

Q Is it fair to say that compensation ordinarily would be measured in terms of the production that was required?

A Yes.

Q And the production that was completed?

A Right.

Q Who determined how much production was required?

A The decision as to the requirement of production was on a day to day basis as myself, an Employer telling the men how many boxes I needed for that particular day.

That reflected in all the bakeries with regard to my brother and my partner in Far Rockaway, Phil Zarowitz.

Q Did there ever come a time when you had to subcontract for bagels, or is it fair to say that all during the subject years your production requirements were met strictly from your own shops?

A Strictly from my own shops and from my own decisions.

MR. SISKIN: I have no further questions of this witness.

JUDGE ROSE: Mr. Appell?

RECROSS-EXAMINATION

Q (By Mr. Appell) Did most members of the Bagel Bakers Council take on groceries, to your knowledge?

A To my knowledge some did and some didn't.

I wouldn't have any direct knowledge.

Q Was this a source of profit to you?

A It was a source of a necessary profit to us.

Q '66?

A In early '66 and then on through as an adjunct to our bagel business.

Q And you still have it to this day?

perience when I was in the Union, being a young man in the Union at that particular time I would have to wait in the Union office for a telephone call from a particular employer to say that that particular day he would need a job.

That goes back to 1938.

Subsequent to that it became the practice of the shops themselves with regard to the itinerant workers that wherever there was a job available the delegate would say to this particular man "You go to work in this shop for a day, you go to work in that shop for another day."

There were some individuals that worked in six shops in one particular week.

It all depended on the work available for particular days which was mostly weekends when they had the overtime and the fill-in days during the week.

They were relief men.

Q Answer me this, in 1966 was bagel selling, bagel bakeries a competitive industry?

A Competitive on what level, sir?

There are two levels, wholesale and retail.

Q Well, did you have competition for your product, just generally?

A On a wholesale level I did.

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A It depended on the proximity of another bagel baker near me who would set the pace.

Q Were you also in competition with other food items such as doughnuts and breakfast rolls and that sort of thing?

A No, sir, not me in particular, but in some instances there were some bakeries that did take in doughnuts.

With regard to -- I don't know if it was competitive or not, but just as an adjunct to their business.

Q Did your business and throughout the time that you have been in business, as your business fluctuated according to competition?

Have you had peaks and valleys in your business?

A When I was in the wholesale business it did.

Q How about in retail?

A In the retail business, again, I'd say in 1967, as I mentioned earlier, when bagel bakeries started mushrooming, when Union people started opening up bakeries and other outside sources opened up bakeries, it seemed to take away the general area trade we had previously because people moved into that particular general area.

Q So if another bakery would move into your general area --

skim.

Q Skim some of your business?

A Certainly.

Q Based on price and based on quality?

A Based on proximity to the particular buyer.

Q Would this be the case with the other bagel bakeries in New York City?

A It happened all over, sir.

At this time I can conjecture a guess as to the number of bagel bakeries in the general area as compared to them.

Q Tell us about how many bagel bakeries there are in New York?

A At least a 100 or possibly more.

Q Now, in 1967 and in 1968 were you competing for business with other members of your Council?

A No.

Q Did you compete for business?

A No, sir, not at all.

Q Why would that not be the case?

A Because I was not in the wholesale business any more.

I did not solicit any of the supermarkets or the wholesale bread bakeries.

Q How about in 1966, were you in competition with other members of the Council?

A At that time I was.

With regard to specific retail -- supermarket chains.

When a store opened on that level.

Not to take the complete chain away but a new store opened up, it was like any store that opened up, we went out to solicit that particular trade.

Q You were in the business of selling as many bagels as you could every week?

A Yes.

Q You would sell them wherever you could?

A In fact there were plenty of times where specific propositions were made to induce purchase of my bagels to the particular customer.

Q Would it be fair to say that you were in competition with other members of the Council for retail trade?

A No, sir.

Q Is that as a result of the proximity?

A Correct.

Q People wouldn't drive across town to buy your bagels specifically?

A No, there's very little difference between one bagel and another, sir.

Q Yes, that was actually said, the small amount that concerning the number of bagels that were baked by the bakeries in 1966, I believe you stated that a reasonable average would be something in the range of 5,000 dozen per week per bakery; is that about right?

A Approximately, yes.

Q That comes to 2,700,000 bagels a week.

Would that be reasonable?

A Reasonable.

JUDGE ROSE: It is a lot of bagels.

Q Finally, this matter of losing the wholesale business and just the competitive nature of the industry, as I understand you testified to, was this a factor in your negotiations for your contract that then resulted in the lockout in 1967?

Was this an item of negotiations?

A In a sense it was.

I wouldn't say it was directly so because the contract period always came up at that particular time and there were a lot of other items involved with respect to a contract.

But we tried to maintain a status quo with regard to being able to compete with outside sources on the wholesale level, and that went right on through the contract period negotiation time and not being able to to take the position that they always did in the past where there would be no contract, no work.

That is the way we left it as of that particular date.

JUDGE ROSE: I guess I have no other questions.

Mr. Siskin, anything further?

FURTHER REDIRECT EXAMINATION

Q (By Mr. Siskin) Now, was an effort made to try in the course of negotiations with the Union, try to enter back into the competition such as with the wholesale accounts, by trying to reduce labor costs with the Union so that you could compete effectively with the wholesale?

A It was one of the subjects of our negotiations.

Q Did you ever succeed on behalf of the Council in arranging that reduction?

A Never.

MR. SISKIN: No further questions.

FURTHER RE-CROSS EXAMINATION

Q (By Mr. Appell) Prior to '67, Mr. Madorsky, did you solicit wholesale accounts?

A Prior to '67?

Q Yes.

A '66, '65, '64, you mean just prior?

Q That was part of your regular business to do that?
A Yes.
Q In '67 did you solicit wholesale?
A No, sir.
Q In '68 did you solicit wholesale?
A No.
Q Did there come a time after that when you did solicit wholesale?
A No, at no time did I solicit wholesale after that.

MR. APPELL: No further questions.

FURTHER REDIRECT EXAMINATION

Q (By Mr. Siskin) Can you tell us why you didn't solicit wholesale?
A I did not want that to become an adjunct of my business any more.

I had that experience in the past with it.
Q Because you could not compete with the costs?

MR. APPELL: Objection.

JUDGE ROSE: Mr. Siskin, that is leading.

He has answered your question.
Q (By Mr. Siskin) Can you tell us what led you to suspend solicitation for the wholesale accounts?
A There were times where certain customers would

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to me it was not reasonable to them and they disappeared because it would become a loss factor if I intended to solicit business.

Q Do you recall the specific prices at that particular point in time?

A What year are you talking about?

Q '66, just prior to --

A It is whatever the traffic would bear.

There was no specific price.

Q Was there an opportunity given you to meet the price of the competition by the wholesale accounts?

A In '67?

Q In '66 did the accounts that you had give you an opportunity to try to best or better the price given by the raiders?

A By telling me that if I could beat their price I would be able to serve them but that will be a self-defeating purpose.

Q Who have you that opportunity?

A Walbaum's.

Q Anybody else?

A With regard to price, Herman Star Bakery and Gold Star Bakery.

MR. SISKIN: No further questions.

MR. APPELL: Nothing further, your Honor, subject to recall with the records that may be produced.

JUDGE ROSE: One final question.

With regard to the number of bagels that you would make now in 1967 and what you could sell, did the new bakeries that opened up, did they have any effect on your business?

THE WITNESS: Yes.

JUDGE ROSE: Describe that for me.

THE WITNESS: In 1967, myself, baking on a retail level, any bakeries that opened up around -- near me, within a mile radius, two mile radius, they actually circled our whole particular area at the time, would skim away at least five to ten percent of the business.

In the aggregate amount I would say about 30 percent of the retail business disappeared.

JUDGE ROSE: How many such bakeries opened in 1967?

THE WITNESS: In 1967 I think in Bageltown, the Levittown area one, two, three, four that I can think of ofhand.

In the Oceanside area, two or three.

In the Far Rockaway area, three.

JUDGE ROSE: Do you know who opened those bakeries?

THE WITNESS: Individually or the corporate name?

JUDGE ROSE: No, just individually.

Let me ask it this way, do you know whether or not those bakeries were opened by members of the Union who had been locked out of employment?

THE WITNESS: Some were and some were by individuals who signed up with another Union.

JUDGE ROSE: That had not been in the bagel baking industry prior, you mean?

THE WITNESS: The other Union was not a bagel bakers Union, but they just had a Union contract with the Bakers Union under whose auspices they were able to operate and bake bagels.

JUDGE ROSE: Can you tell me, these nine or ten bakeries that opened in the vicinity of your particular bakeries, how many of those were opened by members of Local 338?

THE WITNESS: In the Bageltown area there was an M & B Bakery and that was Krulstein's, in Merrick Bagel City was Jerry Steuerman who was a former Union bagel baker.

In early -- in late '67 Mr. Jack Sugarman opened up in Bellmore.

is within--all these bakeries I'm talking about are within a three-mile radius, sort of a finger area, fanning out of the Bageltown bakery.

In Oceanside one bagel bakery opened up. One opened up in Long Beach, one opened up in Baldwin Harbor, Grand Avenue, I'm sorry, Grand Avenue, Baldwin, which is the next town, and one opened up--there was another one that opened up--I can't remember his name.

You asked about bagel bakers.

JUDGE ROSE: I am talking about these bagel bakers in the vicinity of yourself.

THE WITNESS: By Local 338 members.

In Far Rockaway it was a Morris Mintman.

Oceanside, to refresh my memory, within a half-mile radius, Morris Teitlebaum and his son-in-law opened up on Atlantic Avenue, which is just about half a mile away from our Oceanside bakery.

In Far Rockaway it was Morris Mintman and Stanley Seigel opened up in Cedarhurst. That is what I can remember offhand.

JUDGE ROSE: Tell me about these frozen bagels. Are they still a factor?

THE WITNESS: They are still a factor and I before Lender did and he came from Buffalo, and that was called the Abel's bagels.

They instituted before Lender did the frozen idea as far as bagels are concerned.

There was also in New Jersey an outfit called Gourmet Bakeries, who brought a lot of bagels into the New York area too at that particular time.

There was another one that I don't remember the name of who was in a little town in New Jersey. Now, I am maybe conflicting the two. It is possible that Gourmet came from Baltimore, Maryland, when they came up here, but I recollect there was another bagel outfit or a delivery outfit that brought packaged frozen bagels into the City of New York from New Jersey.

JUDGE ROSE: When did this influx of frozen bagels begin?

THE WITNESS: To my knowledge, I can easily say '64, '65, and then proportioned out.

JUDGE ROSE: It was sometime prior to the '60 's.

THE WITNESS: Because it had to be introduced into the market to become an item of interest.

The interesting item with regard to the

on of our fresh bagels.

JUDGE ROSE: You already said the frozen bagels aren't very good.

THE WITNESS: I will stand on that record, Your Honor.

JUDGE ROSE: Are they really competitive then with the bagels that are baked in the bakeries--

THE WITNESS: On a price level they are.

JUDGE ROSE: People will buy them because of the price?

THE WITNESS: Because what they do is, they substitute. They let them thaw out and they doctor them up by reheating them, by adding spices to them and doing other things with them.

JUDGE ROSE: That is all I have. Anything further?

FURTHER REDIRECT EXAMINATION

BY MR. SISKIN:

Q Mr. Madorsky, prior to the frozen bagel introduction into the market, is it fair to say that the hand bagel production, handcraft system used to find the stores, the retail stores, the luncheonettes, had their regular customers?

A Yes, that was part of our wholesale busiduction of frozen bagels and the penetration of the market, that the luncheonette trade, so to speak, became a frozen bagel luncheonette?

MR. APPELL: Objection to the leading.

A I don't think--

JUDGE ROSE: Well, this is pretty vague, isn't it, Mr. Siskin?

MR. SISKIN: I'm talking about market conditions, Your Honor, in the areas we are talking about.

JUDGE ROSE: Well, establish this witness' basis of knowledge.

MR. SISKIN: If you want I will go into that.

JUDGE ROSE: Well, otherwise I am going to sustain the objection.

MR. SISKIN: I believe the witness has testified that he was in the business for thirty or more years at this time.

He sold, produced, made the bagels, checked with the customers, checked with the trade and solicited business on a daily basis.

I don't know of anybody else that wouldn't know any better than he would or who would know any better he specifically knows, and you are talking about the whole market in New York City and all the luncheonettes. Ask specific questions.

BY MR. SISKIN:

Q Was it routine and normal business practice for the handcraft bagel shops, prior to the introduction of the frozen bagels, to solicit the luncheonettes in their area for the sale of bagels?

A Yes.

Q Do you know that to be true?

A Yes.

Q Of your own knowledge?

A Yes.

Q Do you know of your own knowledge whether this neighborhood luncheonette traffic or trade was penetrated by the frozen bagels?

A I don't think the luncheonettes were penetrated by the frozen bagels because the frozen bagels needed freezer compartments for storage and the prime source of that would be the supermarket chain.

Q Well, was there a penetration of the normal retail, of the normal luncheonette trade by some other factor other than frozen?

with regard to other areas. I had no knowledge.

MR. SISKIN: No further questions.

FURTHER RECROSS-EXAMINATION

BY MR. APPELL:

Q Do you have any knowledge whether these new places that you mentioned that opened up in '67 employed members of the union who were locked out by the Bagel Council?

A Some did, some didn't. I wouldn't know specifically. I would have no way of knowing.

Q What are the names of these new places?

A I know of one which opened up near us in Bageltown of Levittown.

Q M & D?

A M & B.

Q And Bagel City was another?

A Bagel City was another one.

Q Do you know the one in Wantagh?

A Wantagh, I don't know the name of it. I Don't know the name, but I know it was opened by a fellow named Charlie Kaplan and a partner. I don't remember the name of the other partner.

Q How about the one in Far Rockaway?

A That is Morris Mintman who opened up in

BY MR. APPELL:

Q Mr. Amster, do you recall the union making payments to the members who were employed in the industry in 1966 for vacation and holiday pay?

A Yes, sir.

Q Do you have personal knowledge as to how much that amount was per baker or bagel maker in 1966?

A I wouldn't have the exact amount but I know it varied, checks amounted to a little over $1200 and distributed to the bakers in three phases.

One was a Passover check, one was a summer check around July time, and another was around the Christmas-New Year time their three checks were issued.

Q You say three of them totaled about $1200?

A Yes, sir, or a little better, sir.

Q To your knowledge, was this amount also paid to the kettlemen or helpers?

A I believe it was less.

Q Do you have any idea or any knowledge, I should say, as to what that amount was for the kettlemen or helpers?

A No, I don't.

Q With respect to the year 1967, do you have and holiday payments to the bagel bakers and makers?

A Yes, sir.

Q How much was that amount for in '67 per person?

A Well, if my recollection is correct, I know in the year '67, we issued one check. It was a small check, and we instituted a vacation pay should be paid three and a half per day per man.

Q When was that instituted, do you remember?

A In 1967. I couldn't--I don't recall exactly when.

(continued on next page)

A The amount per person?

Q Yes, that was actually paid, the small amount that you mentioned?

A No, I don't recall, sir.

Q Do you recall if it was about two twenty-four?

Does that ring a bell to you?

A It would be in that area, sir.

Q Do you have any notes with you that would show that?

A No, sir.

MR. SISKIN: Objection.

The figures really are erroneous.

There is no hook-up between the three fifty a man and the two twenty-four for the year that is mentioned, none whatsoever.

In fact, the total is much larger.

JUDGE ROSE: Well, Mr. Appell?

MR. APPELL: Your Honor, I think the testimony would speak for itself.

I would like to, however, examine him further when that shift to $3.50 per day took place.

JUDGE ROSE: Very well.

The objection is overruled.

any formula went into effect in '66 as opposed to '67?

A No, I believe it was '67, sir.

Q How soon after the lockout began, do you know?

A No, I really don't.

Q Do you have any other papers on you that you haven't shown yet?

A No, sir, except the one that Mr. Levine took.

Q Did you have with you this morning a small piece of paper that indicated how much the vacation payments were in 1966 or '67?

A Yes, I did, but what I quoted you, sir.

Q Do you have it with you now?

You have that paper?

A Yes.

I made a few other notations on that.

Q This piece of paper that you have handed me, what is the source of the information on there?

A My knowledge, sir, to the best of my memory.

Q I ask you to look at this piece of paper which says 1967.

Will you tell us what you wrote after that?

A Two two four, sir.

Q What else does it say?

MR. SISKIN: Objection.

I would like to know when it was written, where it was written and who told him to write it.

His testimony just up to now has been that he could not locate any of the records up to those years.

MR. APPELL: Your Honor, that is proper cross-examination or voir dire if the document is offered.

I think I should be permitted to continue examination.

JUDGE ROSE: Well, I don't know what this is suppose to mean, Mr. Appell.

Can you lay a predicate?

MR. APPELL: I'm trying to establish the amounts of holiday and vacation pay paid to the various people in 1966 and 1967.

The witness has a piece of paper, he has the figures down on this and I want to ask him the source of that information so that I can --

JUDGE ROSE: Are you going to introduce that document?

MR. APPELL: Not at this time, your Honor.

I am using it to refresh his recollection.

JUDGE ROSE: Well, first prove his recollection is exhausted then.

Q (By Mr. Appell) Mr. Amster, do you now recall at this time how much each person received from the holiday and vacation pay funds of the Union in 1967?

A All except that $224, sir, I couldn't tell you.

Q Was to your knowledge $224 paid to the men?

A That's right.

Q Was there an additional amount paid in 1967?

A Yes, sir.

Q Could you explain that?

A Well, we instituted, instead of having the contributions sent to the Union, each individual man that worked that particular day would receive $3.50 per day towards his vacation and holiday.

Q Did that begin during the lockout or after the lockout, to the best of your knowledge, if you remember?

A I don't recall, sir.

MR. APPELL: No further questions at this time, your Honor.

JUDGE ROSE: Mr. Siskin, redirect?

REDIRECT EXAMINATION

Q (By Mr. Siskin) Who asked you to produce this paper here today?

A I brought it on my own, sir.

Q Where did you obtain the information from?

A Well, I was thinking back to my own knowledge, sir.

Q Did I ask you to produce this information in any subpoena?

I don't believe Mr. Campbell as a law office.

He may be in Washington doing lawbooks there.

That was the last I heard of it, sir.

He may have the office here.

I really don't know right now where he is.

Q Do you know whether any of those records were ever destroyed that we requested?

A Not to my knowledge, sir.

Q No?

The answer is no?

A I don't know if they were destroyed or where they are.

I have no knowledge of where the records are.

As I explained the search is still going on for the records.

MR. SISKIN: I have no further questions of this witness.

JUDGE ROSE: Mr. Appell?

MR. APPELL: Yes, your Honor.

RECROSS-EXAMINATION

Q (By Mr. Appell) Mr. Amster, do you have any knowledge if in fact the frozen bagels did have an effect on how many men were employed in the bagel industry?

A Somewhat, sir.

Q Is it for a long time?

A Oh yes.

Q How about the machinery, do you know if that was in wide use in '67 or '68?

A The bagel machine, sir?

Q Yes.

A To my knowledge I believe it was.

I really don't know, but to my knowledge I believe it was.

Q Do you know who had it?

A Well, the introduction of the machine, as I said, was the Bagels, U.S.A.

Q Do you know any other employers who had it in '67 or '68?

A Not offhand, sir.

MR. APPELL: No further questions, your Honor.

JUDGE ROSE: All right, you are excused.

Call your next witness, Mr. Siskin.

MR. SISKIN: Mr. Weiner.

Whereupon,

ISRAEL WEINER

was called as a witness by and on behalf of the Respondents and, having been first duly sworn by Judge Rose, was examined and testified as follows:

JUDGE ROSE: Please be seated and state your name and address for the record.

A Well, at the beginning of the lockout I was mostly at the Union office, and I wasn't given work unless it was -- work available.

First it was given to the members who weren't active at that time, actively working.

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Q Do you remember when you first started working in the period after the lockout began?

A I really can't recall.

May have been in October, November until after the lockout, that four-month period.

I really can't recall.

MR. APPELL: I have no further questions, your Honor.

JUDGE ROSE: Mr. Siskin?

REDIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Horowitz, as president did you ascertain how the welfare vacation fund formula was arrived at for any of the back years or the years of '67 or '68?

A I can't recall.

Q Well, do you have general information as to formula that was used?

A I can't recall.

Q Was it any different in '66 as the formula than '67?

A I can't recall.

Q Was it keyed to days or was it keyed to boxes produced?

A I don't remember what year.

I think it was instituted in '67 the shops operated I think it was on a $3.50 per day basis, I think.

I'm not sure.

Q How about in '66?

A '66, I don't recall how it was based, the vacation and holiday.

Q Did you attend meetings of the Union during the year 1967 where minutes were taken?

A We had minutes taken.

Q Was that true at all the meetings, the executive board meetings?

A All the minutes were taken.

Q How often were those meetings held?

A They were held maybe twice a month, sometimes every week.

It depended if it was an urgent situation, it would be held every week.

If it was non-urgent it would be held every other week.

Q Do you recall who your officers were at that time?

A In '66?

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Q (By Mr. Siskin) Now, did you ever serve as an officer of the Bagel Bakers Council?

A Yes, sir.

Q Was that true for the time prior to 1967?

A That's right.

Q And was your shop one of the bakeries in this labor Council?

A That's right.

Q Now, will you tell us what was happening in the industry, to the best of your knowledge and recollection, in the year 1966, prior to the -- prior to the year 1967, beginning?

During the year 1966.

A Well, at the beginning of 1966, we were notified by the various chains that there was a mechanized type of bakery coming into the picture, and that the price would have to be reduced considerably.

Now, these chains didn't care whether we made them by hand or by machine, as long as we met the price.

The would give us first crack at it, if we met the price.

At that time, a few of us got together and went up to see the Union to explain the situation. This was in the early part of --

Q Can you tell us who the few of us were?

MR. APPELL: Excuse me, Your Honor, the witness didn't finish his answer.

MR. SISKIN: I'm trying to amke a better record.

JUDGE ROSE: Go ahead.

A I said, "a few of us." I meant, a couple of fellows and friends of mine, who also had bagel bakeries, Dave Borke, Lou Madorsky, Julie Madorsky, his brother. Lou Glass was along with us.

I don't recall, but there were always about five or six of us.

Q What did you do?

A Owners have bakeries.

Because they all had a similar problem.

You see, because if you served, for arguments sake, a Waldbaum's store, or a Big Apple store, we didn't serve them all.

Yes, Tri-Boro Bagel Bakery, because Mr. Meyer Cohen, Sol Goldbaum, deceased, he should rest in peace. Each one of us served one or two or three stores, some had more, some had less, at the various locations, outside of the Tri-Boro Bakery, which served the Food Fair store, exclusively.

I served two or three stores in my immediate area for the Tri-Boro Bagel Bakery, because they found that it was more profitable, if I served them, and under subcontract type of affair.

Now, when one was notified, in other words, we were all notified that the price would have to come down.

We had meetings, various meetings with the Union, and that there was such a thing as a W & S Bagel Bakery opening in the Bronx, or Throgs Neck, to be exact, and also the Lender Bagel situation, and then there was an Able Bagel situation, which came in frozen, were all coming into these stores.

We knew, according to the contract, we would not be able to meet these prices. We would have to lost money immediately, so there was no sense in even looking to continue serving stores, unless we got some relief from the Unions.

Now, after all of these meetings with the Unions, they did -- the Union did see fit to allow some concession in one or two bakeries, but not in mine.

In other words, there was sort of a favoritism among the Union officials and some of the bakery owners.

MR. APPELL: I move to strike the last statement.

JUDGE ROSE: Sustained.

It may be stricken.

A Now, this was the early part of 1966. Sometime during the year of '66, we did lose these accounts. It just wasn't feasible to continue serving and losing money.

And you can see by my tax returns how much was really lost.

Q Did there come a time when you actually went to see this Throgs Neck Bakery?

A Yes.

Because I was interested in seeing what the machine looked like.

We had heard about machines for many years, but I never really saw it. And I did see, it was a Thompson type of machine, produced by Thompson Bagel Bakery in California.

Q Did you go to that establishment with several other --

A Yes.

Q -- bakery people?

A Yes, with several of my colleagues. Yes.

Now, I might add that the Union did not permit us to put in mechanized tyoe of operation.

Our --

MR. APPELL: Your Honor, I'm going to move to strike --

JUDGE ROSE: Sustained.

MR. APPELL: There's no question pending.

Q (By Mr. Siskin) I'llask you the questions, Mr. Kalkstein, if you would just try to limit your answers, please, to the questions.

A I'm sorry.

Q Now, do you recall what you saw when you went to Throgs Neck Bakery?

A Yes.

I saw a machine producing bagels. All you had to do was put the dough in. It went through one machine, came out, and became a bagel.

Where, with us, we had to have three men to make that bagel.

Q And did you notice how many machines they had in that establishment?

A Well, I wasn't permitted.

I just stood at the doorway, and I saw one machine.

Whether they had more than that, I don't know. They might have, I don't know.

But, I did see one machine.

Q Following that visit to Thorgs Neck, did you take the subject up by yourself or by committee, with the Union?

A By committee. It was always by committee.

Because if we didn't go in a committee, we couldn't be heard.

Q Who did you speak to when you went to the Union?

A Well, there was always a committee headed by the delegate or business representative. He was at the head, a man by the name of Benny Greenspan, who is deceased.

Q And did you present demands to the Union?

A Well, I wouldn't call them demands.

We outlined our problems and said that we were going to lose our business if we didn't get some relief from them. There was just no way for us to continue serving bagels at a loss.

Q Following that time, did the Union take any sort of affirmative action in 1966, with respect to any of the bakeries?

A Well, I knew about one bakery where they did offer some help, but outside of that, I really don't know.

Q Where was that bakery?

A Right now my mind is blank.

I knew about it before, but I'm blank.

I'll think about it in a minute.

Q Now, did there come a time when --

A Excuse me, it was in the Bronx. A fellow by the name of Joe Rubenstein.

Q Did there come a time when you entered into a period of negotiations with the Union, in 1966 or 1967?

A You're referring to contract?

Q Yes.

A Discussion?

Q Yes.

A Yes.

We had discussion -- we had contracts every, single year.

MR. APPELL: Your Honor, I'm going to object to Counsel going into anything that's been found as fact by the Board.

MR. SISKIN: We'renot going into anything that's found as fact.

We're going into contract negotiations with respect to price.

It's relevant in this proceeding.

JUDGE ROSE: Overruled.

Well, let me say this. I'm not really overruling your objection.

I'm just not sure that it goes to what he's asking at this point.

MR. APPELL: Yes.

JUDGE ROSE: If that's correct, anything that's found in the previous hearing, of course res judicata, we not going to relitigate.

Go ahead.

Q (By Mr. Siskin) And at that particular point, just prior to what was characterized as the lockout, did you present the situation that existed in the industry, with respect to the competition, to the Union?

A Yes.

Q And did you request --

Did the Union indicate that they would picket any of the shops that were handling the frozen bagels?

A Yes.

Q Did the Union in fact picket those shops?

A Yes.

There was a committee formed, and I believe they picketed the Waldbaum's stores, for a short period of time.

Q Was that what was called educational picketing?

A Yes.

Q And did the Union do that pursuant to your -- to this committees request?

A That's right.

Q Will you tell us what happened with respect to your wholesale business, once the competition had entered into the field that you referred to?

A Well, my accountant told me that if I would continue to serve, I would be put out of business entirely.

MR. APPELL: Your Honor, I move to strike that.

JUDGE ROSE: Sustained.

A Well, I lost all of the wholesale accounts.

Because I couldn't meet the price.

Q Can you tell us which accounts you lost?

A I had a few Waldbaum's, Big Apples, there was a Fair Mart type of store.

I served some Food Fair stores for the Tri-Boro, and when they lost that I lost it also.

And other chains, which I don't recall.

Q Were they lost prior to the lockout?

A Yes.

Q Can you tell us --

Can you fix a point in time when they were lost?

A It was sometime in 1966.

Q Now, --

A Right after the summer, I believe it was.

Q Would you say it would be in the fall?

A About that time, yes.

Q Now, did you do any grocery business in the year 1966?

A No.

We were wholesale bagel bakers, up until 1967.

Now, in fact, the front part of the building, we rentedout to a barber shop, and then used only assigned entrance for the workmen.

It was an "L" shaped building, and the workmen would come in through the side entrance.

Q When did you rent out the building to a barber shop?

A In 1950, something like that.

Q So, for some time prior to 1967, the front of the business, the retail front, in effect, was a barber shop?

A That's right. That's right.

Q And was your factory in the back of this?

A In the back of it.

Q Back of this store?

A True.

It was only a factory, no store of any kind.

Q So, you didn't have any retail operations until what point in time?

A Well, if someone would come in during the night for a half a dozen bagels, I would sell it to him. But, that's not what I would call retail. If we did $5.00 worth of busines during the night, it was a lot. I had no cash register of any kind. But that was the extent of it.

It was actually 99-3/4% wholesale bagel bakery, with the trucks coming to pick up the merchandise and delivering it to the various stores.

Q At what point did you decide to go retail?

A Well, when we lost all of the wholesale, there was nothing else for me to do. I just didn't know what else to turn to.

So, we had to decide to do something.

I had my entire family with me, my father, my brothers, children.

So, we decided in going into grocery business, in conjunction with bakery.

I noticed that the Italian bakers are doing that, have been doing it for many years, and that's exactly what we did.

MR. APPELL: Move to strike what the Italian bakeries did.

JUDGE ROSE: Sustained.

A So, that's what we did. We, each and every week, or every month, I would add another item, whereas today, I run a full supermarket, in conjunction with the retail bagels.

I have no wholesale, I lost the wholesale in 1966, and to this day, I have no wholesale.

In fact, I even gave up my wholesale permit with the Board of Health. I have a retail type of permit.

Q When did you give up your wholesale permit?

A In 1968.

Q Okay.

Now, in the year 1967, did you have any wholesale accounts at all?

A In 1967?

Q Yes.

A No.

Q And is it fair --

A We lost them in 1966.

Q Is it fair to say that you converted to retail some point prior to the lockout, or after the lockout?

A After the lockout.

Q Okay.

When did you convert to retail?

A 1968.

Q Can you fix a date, a point in time?

A Well, like I said, it was -- I kept adding items, as I went along. But it was after 1968.

Q All right.

And in 1967, did you have any percentage of your business that was wholesale?

A No.

Well, we couldn't have anyway, because the Teamsters were on strike, and there was picketing out front.

Q That was a different Union?

A Different Union.

Q When did the Teamsters Union picket you?

A At the same time that the Bagel Bakers were out.

Q And did there come a time when you brought Union employees back into your shop?

A The Union sent back the two steady men that I had.

Q When was that?

A I believe the date was February 1, '68.

Is that correct?

Q And did they continue to work after that date?

A Yes.

Well, not up to the present, but they did start to work at that time.

Q Was there any interruption after February, 1968, or did they work steady?

A They worked steady.

Q Those were both Union men, were they not?

A That's right.

Q And was that true for the period from February 1, '68 through and including September 30th, '68?

A I don't recall the dates.

It was after February 1st.

Q There was no interruption?

A No.

Q In Union employment, is that correct?

A No.

JUDGE ROSE: Would you identify those two men?

THE WITNESS: Michael Kalkstein and Paul Bernard.

They are not on the list.

JUDGE ROSE: Spell their names, please?

THE WITNESS: K-A-L-K-S-T-E-I-N, first name, Michael.

Second name, Paul Bernard, B-E-R-N-A-R-D.

Q (By Mr. Siskin) Now, did there come a time when you began selling things like soda, salads, et ceteras, grocery items, to a preponderant extent in your store?

A Yes.

Q When was that?

A We started that in 1968.

Q Can you fix a point in time?

A At the beginning of 1968.

January, February.

Q That included icecream, chocolate, things of that sort?

A Every item you find in a supermarket, I sell, including drugs. Kotex, Modess, things like that.

Q Now, in the year 1966, do you recall what your sales were?

Approximately.

A Well, I wouldn't remember --

Q Would it refresh your recollection --

A It's on this return, yes.

Q Would you --

A In 1966 --

Q Looking at those tax returns, will you read out the sales for 1968, 1967 and 1966 -- excuse me, 1966, 1967 and 1968?

A 1966, we had total sales for the year, $179,956.10.

Forget the pennies.

And in 1967?

A 1967, we had $67,997.51.

And in 1968?

A In 1968, we had 97,692.34.

I'm sorry, I gave you the pennies.

Q Thank you.

Now, will you also tell us, by looking at line 28 on those tax returns, what the net operationg results were of the companies, ofr the three respective years, mentioning each year?

MR. APPELL: Your Honor, I object.

The document is in evidence and it speaks for itself.

MR. SISKIN: I need this for testimony, why the losses revolved, and --

Do you want me to just recite it?

JUDGE ROSE: The document does speak for itself.

MR. SISKIN: I'm just trying to save time in testimony.

JUDGE ROSE: You can do that, and that's fine, and obviously you have to have -- make some assumptions from documentary evidence in order to get testimony.

Just don't mislead the record about what it says.

MR. SISKIN: Okay.

JUDGE ROSE: The objection is overruled.

MR. SISKIN: I'm trying to facilitate the testimony, Your Honor.

Q (By Mr. Siskin) Will you recit line 28, taxable income or loss, for each of the three years, starting in 1966?

A 1966, at the end of the year, we lost $2,769.00.

Q And in 1967?

A In 1967, we lost $11,166.00.

Q And in 1968?

A In 1968, $1,1399000.

Q Now, do you have the records for those years?

A Yes.

My accountant has them.

Q Will you produce those records --

A If necessary, yes.

Q And do you have the records for flour purchases, the documentation, and the records for sales?

A Yes.

Q Will you produce those, if you don't have them here today?

A I don't have them with me.

My -- I asked my accountant if that was -- I asked him for some substantiating evidence. That's what he gave me.

If I need more, I can get it from him.

Q I would ask you to produce the original ledgers, if you have them, and the original purchase journal or record which would indicate those purchases.

A We should have them.

Q And the payroll costs for those times?

A Yes.

JUDGE ROSE: What do you have in mind, Mr. Siskin? Bringing this witness back?

MR. SISKIN: I don't have any choice, Your Honor. He didn't bring his general ledger.

JUDGE ROSE: He's your witness, Mr. Siskin. He's your client.

I expect your witnesses to be prepared to testify.

MR. SISKIN: He's still going to testify, Your Honor.

I'm not asking him to circumvent that testimony.

I'm trying to elicit the actual backbround and the actual documentation involved here.

THE WITNESS: Excuse me, Your Honor, if I may say this?

JUDGE ROSE: No.

Go ahead, Mr. Siskin.

But we're not going to try this case piecemeal, bringing -- excusing witnesses, bringing them back, that type of thing.

MR. SISKIN: He may be able to get them this afternoon, Your Honor.

I don't know.

MR. APPELL: I should then like to state, at this point, that I would like the same information that I requested of Mr. Madorsky's companies, of this gentleman, and indeed for all subsequent ones, so that Mr. Siskin may be put on notice, and that includes payroll records, also for the years '65 to '71.

MR. SISKIN: I have no objection.

JUDGE ROSE: Okay.

MR. SISKIN: I will instruct my witnesses to bring those records, where they have them.

JUDGE ROSE: Very well.

Proceed.

Q (By Mr. Siskin) Now, how did you determine whether you needed any bagel bakers during the time that you were operating a retail shop?

Operating, excuse me, a wholesale shop.

A Well, to start with, according to the contract, we had to employ three men and a kettleman. Whether you needed it or not, that was the contract.

Now, it was only the overage, when we had the wholesale, if we needed anyone over, we would notify the Union. And they would keep that as a practice, and they would send the people in.

Q Is it fair to say that, in effect, your shop would operate on a piecework basis, as regards the employee -- the bagel employees that produced the bagels?

A That's true.

Q Was that true in '66 and '67?

A That's true.

Q And in '68, to the extent that you made bagels?

A True. True.

Q And is it fair to say, also, that the amount of production would be governed by the amount of sales expectations that you had?

A That's true.

Q You never produced, so to speak, for inventory, or for anything more than you needed for the next day or several days, is that fair to say?

A That's true, because it's a fresh product.

You had to bake and deliver. You couldn't keep it.

Q And is it also fair to say that during the year 1966, '67 and '68, there was some sort of a ratio between payroll and sales?

A Yes. Of course.

Q So that, if your sales went down, would it be fair to say that your payroll --

MR. APPELL: Objection.

MR. SISKIN: That's pertinent, Your Honor.

JUDGE ROSE: Let him finish the question first.

MR. APPELL: He's leading the witness, Your Honor.

MR. SISKIN: I'll withdraw the question.

JUDGE ROSE: Okay.

Q (By Mr. Siskin) To your knowledge, was there a correlation between labor and sales?

A There had to be, because this was a piecemeal basis, and if we made more, we paid more. If we made less, it would reflect itself in the forms. In the tax form. In our books.

Q And for the years 1966, '67 and '68, did you participate in the management of that company, on a day-to-day basis?

A That's true.

Q Were you aware of day-to-day developments in the shop?

A I was.

Q Now, can you tell us the procedure that was used in obtaining help from the Union in your shop?

A It was the practice in the industry to call the Union official and to tell him how many men you needed.

During the weekend, we had our steady men. I had two steady men.

For the weekend, we would notify him on a Thursday, Mr. Greenspan was delegate then, to let him know how many men we needed. According to the production; and he would send in the men.

I was not able to hire anybody myself. It had to be done through the Union.

Q And as a practical matter, did this mean that you wouldn't ordinarily have more people in the shop than you had work available?

A That's right.

Q Now, were you permitted to work in the shop at that time?

A According to the contract, I was not permitted to work.

No Employer was permitted to work.

Q Did you receive any permission to work?

A Only if a man didn't show up.

Not that I received it. I had to do it myself.

I never bothered to call. But, otherwise, the contract stated very definitely that I was not permitted to work.

Q Was it understood by you that if help -- if the necessary help did not show up, that you would continue to -- you'd have to do the work yourself?

A Well, we had to.

If the dough was made, it had to be made and baked immediately. There was nothing else we could do.

Q Did there come a time when the grocery portion of your business became the major segment of your business?

A That's true.

Q Can you fix a point in time?

A Well, it's difficult.

But it was the beginning of -- it was somewheres, it started the middle of '67, at the time of the strike, when we weren't able to bake anything for wholesale.

At that time, we started to take in the groceries, and as time went on, I kept adding new items.

But, I guess, you can say somewheres in '67.

Q When did you establish a retail opening to your store?

A I never did that.

It was a continuation from that point on, in January.

Q Well, did you still have a barber shop?

A No, I didn't have it, because the man died.

Q I see.

When did that shop close?

A Just before that time.

I don't remember the exact date.

Q Now, what was the practice in the industry with respect to weekend employment, when the major help would be needed?

How would you obtain help just before the weekend?

A We would speak to the Union delegate on Thursdays, and notify him what the order would be, and they would send men accordingly.

Q And was the bulk of your retail business, or the bulk of your bagel business, done on the weekends?

A That's true.

Q And is that when you normally would get the heaviest payroll, would be on the weekends?

A That's true.

Q Did there come a time when you ever solicited any of your wholesale accounts again, to try to get back the wholesale accounts?

A Yes. We went to visit them, but I just couldn't meet the price that they quoted me.

I wasn't quoting them any more, they were quoting me a price. Because they were using the machine shop as a basis. And I just couldn't meet it.

So, that was the end of that.

JUDGE ROSE: When was this supposed to have happened, Mr. Siskin?

MR. SISKIN: You're right, Your Honor.

Q (By Mr. Siskin) Can you fix a point in time when you went back to solicit the accounts?

A This was during negotiations, because I did that myself. During the --

I would say, somewheres around the first part of '67. January, about that time.

We were in -- We were negotiating with the Union, and I stopped to see, because doing business with these people for so many years, I was sort of on a friendly basis, and discussed it with them.

MR. SISKIN: No further questions of the witness at this time, Your Honor.

JUDGE ROSE: Cross examination.

CROSS EXAMINATION

Q (By Mr. Appell) Mr. Kalkstein, do you have payroll records here today?

A No.

Because I didn't expect to be called on the stand today.

Q Okay.

You will produce your payrolls for 1965 to '71?

A Yes.

Q Did any particular --

A Excuse me for a minute.

I think I have some summary there.

MR. SISKIN: These are not what opposing Counsel requests.

THE WITNESS: No. I thought I brought a summary.

MR. SISKIN: No, he wants the books.

THE WITNESS: The books, itself, okay.

Q (By Mr. Appell) Mr. Kalkstein, did any of your wholesale accounts specify that W & S was the company that was offering at a lesser price?

A Yes.

Because we were on a friendly basis, as I said before.

Q Who? Who?

A There's a Mr. Morris Pitt, of Waldbaum's store.

In fact, he offered to buy a house near me. We were that friendly.

Q Just answer my question.

Prior to today, were you aware that at least one business in the bagel industry, doing hand craft work, serviced Waldbaum's and Big Apple, after you lost those accounts?

A Yes.

There was a reason for it.

Shall I --

Q Did you ever make any attempt, in 1968, to get back Waldbaum's, Big Apple, or Food Fair?

A Yes, I said that before.

Q In '68?

A Yes.

Q What month was that?

A It was the beginning of '68.

Q January?

A Somewheres around January, February.

And I couldn't meet the price.

Q Did you have other wholesale accounts besides chain stores?

A Yes.

Q You had bakeries?

A Not to any --

In my shop, I was sort of known as the smallest, so I only had -- I had picked this route up myself many years ago, back in 1933, '34, and what I concentrated on was a small type of grocery, small restaurant, dozen bagel, half a dozen bagels.

Did most of this myself until the Teamsters Union came into being, and that's what I was stuck with.

Q Appetizers?

A Small appetizing stores, grocery stores. Small restaurants.

Q What percent, in 1966, of your business, came from chain stores, supermarkets?

A I wouldn't know that.

That would have to be dozens of bagels.

I wouldn't know that now.

Q Would your records show that?

A I don't think so.

It would show bagels.

You don't write that down.

It would show bagels, that's all, in total.

Q You never tried to get your wholesale businesses back, after January, '68, or about that month, is that correct?

A Well, I did go back.

But if I didn't have the chains, it wouldn't pay to put a Union driver on for just a few, small stores.

Q You did go back when, what?

A In, right after negotiations, or during negotiations.

Q That's --

A That was January, 1967, was that? Or '6 --

I don't recall.

What year was it, '67 or '68?

Q Before the lockout or after it started?

A I really don't recall.

It was either '67 or '68. But I did go back. I made an attempt to go back.

Q What year did you lose Waldbaum's account?

A It was the latter part of '66.

Q Did you keep the small wholesale --

Strike that.

Did you keep your small retail outlets as wholesale customers?

A No.

Q In '67?

A No.

Because the Teamsters Union picketed outside the door.

They were giving away free bagels, too.

So, I wasn't looking for any problems. I didn't want any trouble. So, I didn't -- I just let it all go.

Q Would it be fair to state that you lost more than half of your wholesale?

A I lost it all.

I don't have any wholesale today.

Q Would you let me finish my question?

A I'm sorry.

Q Would it be fair to state that you lost more than half of the wholesale that you lost in '66 and'67, because the Teamsters were picketing?

A I wouldn't say it's because of the Teamsters, no.

Q Well, what effect did the Teamsters' picketing have on your wholesale?

A Well, we weren't receiving any, because I couldn't meet the price.

Q You --

A I don't know -- I'm sorry.

Q Are you saying that the Teamsters' picketing had nothing to do with your loss of wholesale accounts?

A That's right.

Q Didn't you say earlier that you couldn't have wholesale because the Teamsers were picketing you?

A You're missing the point.

We lost the wholesale only because I couldn't meet the price.

Afterwards, the Teamsters and the Bagel Bakers got together, and one day I would have a teamster picketing in front of my place, and the next day I would have a Bagel Baker picketing. They were working in conjunction.

They were also giving out free bagels at the time.

Q Is it fair to state, you would have had more wholesale business in that period of time, if it weren't for the fact you were being picketed?

A It's not true, because it didn't pay to send the truck out any more.

Q Now, you said there came a time where you took back Union men after the lockout started?

A I didn't take them back.

The Union sent them back.

Q When was that?

A Was that 1968?

Right after Judge Rosling's order. He sent them back. He ordered us to take them back, which we did.

Q What date was that, do you know?

A Whatever it was.

Was it February 1st?

I don't know.

Q How do you remember that date?

A Just one other.

The Culver Bagel Bakery, which was also sold.

Q To your knowledge, did Culver pick up any of the wholesale accounts that Benson had handled?

A I wouldn't know.

JUDGE ROSE: Spell that, please.

THE WITNESS: C-U-L-V-E-R, Culver Bagel Bakery, Inc.

I'm sorry, I think it's Culver-McDonald. I think that's the name of the place.

Culver-McDonald Bagel Bakery, Inc.

MR. APPELL: Your Honor, I have no further questions at this time, pending production of the requested records, which I believe would include the general ledger, sales records, showing customers, wholesale, retail breakdown, if it's available, purchase of flour and other supplies, of machinery and other equipment, payroll records, and the tax returns to the extent they haven't been produced, all for the years '65 through '71.

JUDGE ROSE: Okay.

Mr. Siskin?

MR. SISKIN: Yes.

I have no further questions.

JUDGE ROSE: I have a couple.

First of all, when you're talking about your discussions in 1966, with the supermarket chains, that's

Waldbaum?

THE WITNESS: Yes.

JUDGE ROSE: At that time, when you were servicing Waldbaum, in 1966, how much were you charging them for bagels?

THE WITNESS: Well, if you don't hold me to it, I think it was around 80¢. Give or take.

I don't recall exactly.

JUDGE ROSE: Eighty cents, what?

THE WITNESS: A dozen.

Somewheres around that number. I couldn't say exactly.

JUDGE ROSE: About 80¢ a dozen bagels?

THE WITNESS: Yes.

JUDGE ROSE: Did you sell your bagels to Waldbaum, or did you deliver them on consignment?

THE WITNESS: Oh, no, no.

Oh, yes, I'm sorry. It was consignment.

In other words, if they didn't sell it, we would have to take them back, yes.

We would guarantee the returns, that's true.

JUDGE ROSE: And when you took them back, then you would pay them back the 80¢, in effect?

THE WITNESS: That's right.

We would deal net amount.

In other words, if they took ten dozen, they only sold five, we would only bill them for five.

JUDGE ROSE: Right.

Do you know how much Waldbaum's sold the bagels for?

THE WITNESS: Right offhand, I couldn't say. I really don't remember.

I'd have to be taking a guess at it. I don't know.

Maybe some of the other gentlemen might remember.

They would work on a mark-up of somewheres around 30%, give or take. Always around that.

JUDGE ROSE: Now, how much did Waldbaum want you to sell your bagels to them for, when the machine bagels started coming in?

THE WITNESS: To meet the price of the machine product.

JUDGE ROSE: What did that mean?

THE WITNESS: Well, I don't recall exactly what it was, now.

JUDGE ROSE: Well, --

THE WITNESS: But it was considerably less.

JUDGE ROSE: What's your best judgment?

THE WITNESS: Somewheres around 60%.

JUDGE ROSE: Sixty cents a dozen?

THE WITNESS: Somewheres around that, yes.

JUDGE ROSE: Sixty percent or sixty cents?

THE WITNESS: It would be the same thing, wouldn't it?

JUDGE ROSE: No.

THE WITNESS: Sixty percent would be 48 -- 50.
Somewheres around 50¢ a dozen, roughly.
Because their labor cost was different.

JUDGE ROSE: And you didn't figure that you could sell bagels wholesale for 50¢ a dozen?

THE WITNESS: By no means, because our labor cost was better than 60%, in our industry.

JUDGE ROSE: Okay.
Tell me about labor costs.
How much does it cost --
What were your labor costs in 1966, per dozen bagels?

THE WITNESS: Well, that's difficult.
You mean, my own?

JUDGE ROSE: Your own.

THE WITNESS: Well, I'd have to get that from my accountant.

JUDGE ROSE: Let's put it this way. Do you recall how much you paid the bagel bakers and makers?

THE WITNESS: Yes.

JUDGE ROSE: How much was it?

THE WITNESS: It was $26.00 for the hundred boxes.

JUDGE ROSE: Okay.

THE WITNESS: That's 26¢ a dozen, times three.

A In my shop, 10 to 12 dozen bagels just for the workmen in the bakery itself, not counting what the driver and helper took.

Q That's on a daily basis?

A That's right.

Q Did there come a time when you had to justify the reasons why you couldn't sell the bagels for the same prices that Waldbaum's were getting, were buying from W & S, or the Throgs Neck Bakery?

A Yes.

Q Did you explain these costs to Waldbaum's?

To any measure, to any detail?

A Yes. By all means.

But there was a situation where Throgs Neck didn't have a Union and we did.

Or they didn't have our type of Union contract.

Q Was their machine strictly a production machine, without any labor function, in making bagels, other than just pressing the machine or operating the machine?

A They had one machine to make the bagels, and then it was baked.

There was another -- a revolving type of oven. A mechanized type of over to bake the bagels.

Q Would you say it was a one man operation?

A One man could do it, yes. One man could make the bagels on the machine and then take it and bak it. Yes.

MR. SISKIN: I have no further questions of this witness.

JUDGE ROSE: Mr. Appell?

MR. APPELL: Nothing further, Your Honor.

JUDGE ROSE: Okay, thank you.
You may step down.

(Whereupon, this witness was excused.)

MR. APPELL: Off the record.

(Discussion off the record.)

JUDGE ROSE: On the record.

Whereupon,

EUGENE MOORE

called as a witness, was duly sworn and testified as follows:

JUDGE ROSE: Please be seated.
State your name and address for the record.

THE WITNESS: Eugene Moore, 169 McNair, M-C N-A-I-R, Street, Brentwood, New York.

MR. SISKIN: At this point, I ask Counsel to produce the credits.

MR. APPELL: Your Honor, I'm furnishing to Counsel Social Security data and W-2 forms for Mr. Moore.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Moore, how long had you worked in the bagel industry, prior to 1967?

to go out in the middle of the night, and he didn't want to stay.

So, he used to come in, stay a little while and then go home.

Whatever was -- If we let him bake, he would have baked everything off in the afternoon and then we wouldn't have had hot bagels at night.

My husband would let him go home, rather than start with him, and he would bake off what we needed, and pay him.

Q Okay.

So, after --

When was it that you determined to quit using a baker?

A Well, while we were negotiating, we were trying to find a way that we could keep our wholesale route, and still compete in the market.

Because, if you didn't give them the price cuts that they wanted, they would just leave. They could get bagels on the outside.

So, this was the way we felt.

The other part was, the Union did take a cut in salary. He didn't remember.

At the time, the foreman was getting 29¢.

When they came back to work, the price was 26¢, all through the industry, for bakers or for bench men.

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They weren't getting extra, the foremen, any more.

Even if he made the same amount of bagels, as he did the year before, he would be getting less money, because his price was less.

Q Okay.

If you hadn't locked out the -- all of these employees, would he have continued to work as a baker until you settled your contract?

A No.

We wouldn't have had any work for him, because we would have lost the customers anyway.

Even with this, we did lose.

The end was, we lost it anyway, as much as we tried. Because they were getting them so cheap.

Even with this less, we had gone, we were giving 48¢ to Levy, a dozen, They still got it cheaper, and we couldn't keep them. Even with that.

But at that time, we did away, like there was no way we could have kept a foreman, plus two men by the bench, and continued to serve the route.

They wouldn't take the bagels from us.

Q Okay.

Is there anything else you'd like to tell me?

A No. That's all.

JUDGE ROSE: Mr. Appell, do you have any questions?

The bench men made 28.

Q Okay.

MR. APPELL: I have no further questions, Your Honor.

JUDGE ROSE: Anything else you'd like to say, Mrs. Lewis?

MRS. LEWIS: No.

JUDGE ROSE: Thank you very much.

(Whereupon, this witness was excused.)

JUDGE ROSE: Off the record.

(Discussion off the record.)

JUDGE ROSE: On the record.

MR. SISKIN: I call Mr. Isadore Glass.

Whereupon,

ISADORE GLASS

called as a witness, was duly sworn and testified as follows:

JUDGE ROSE: Be seated.

State your name and address for the record.

THE WITNESS: Isadore Glass, 3660 Oxford Avenue, Riverdale.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Glass, do you presently hold any title with the Bagel Bakers Council?

A I'm President.

Q And prior to 1967, were you President of the Bagel Bakers Council?

A Yes, sir.

Q How many years have you been President of the Bagel Bakers Council?

A Well, I actually organized them in 1936.
I organized the management side.

Q I see.
Then, you've been involved with this Council since that time?

A Pardon?

Q Have you been involved in the Council since that time?

A Yes, sir.

Q Did you have previous bagel baking experience in the industry, prior to your becoming President of the Council?

A Yes, sir.

Q What was that experience?

A Actually running a business or --

Q Yes.

A I had my own business since 1923.

Q What business was that?

A Bagel business.

Q Where was that located?

A At the beginning, I started on Intervale Avenue. The address I don't remember.
After a year there, I moved to 1416 Washington Avenue, in the Bronx.

Q And was your position in the Bagel Bakers Council, an active one, prior to 1967?

A Oh, yes.

I was always involved.

Q In the course of your duties as President, did you participate in any discussions and conferences and meetings with other members of the Bagel Bakers Council?

A Yes, sir.

Q Did you participate in meetings with the Union?

A The Union.

Q Will you tell us what the status of the industry was, the hand craft industry was, in 1966, prior to the lockout which occurred in 1967?

A Well, actually, I can put it in words like these.

In 1956, I became a partner to another bagel bakery, and in 1960's, I started the -- I saw the trade was deteriorating, and I sold out my share in 1962 to Mr. Kelton bagel bakery.

That's when they took me there as their advisor, and I had about thirty-six shops. I was involved with the Union all the time.

Q Will you tell us what the situationwas in the hand craft bagel industry, in 1966, prior to the lockout that occurred in February of --

A What was what, sir?

Q What was the situation in the bagel industry at that time in 1966?

A The situation wasn't any good.

A bagel bakery opened up in Throgs Neck, and opened up a mechanized shop.

I went up there, I advised the Union about it, and I went up to the bakery there and I looked at it.

And I came back and I arranged a meeting with the Union again, with a committee from the Council, and we told them what's happening, and they promised they'll give us as much relief, as much help as they could.

Which they did, at the beginning.

Q Now, what did you --

Did there come a time when you visited this Throgs Neck shop?

A Yes.

Q Who did you visit that shop with?

A I remember one, Mr. Kalkstein was with me.

I think Mr. Madorsky was with me.

I don't remember Mr. Bork.

Q And can you fix a point in time when that occurred?

A Fix a what, sir?

Q Can you name the time when that occurred, the year?

A It was the early part of '66, or the middle of '66.

Q After you --

Withdrawn.

Did you physically inspect the shop?

A Yes, sir.

Q What did you see when you looked into the shop?

A The most important thing in the bagel shop is two things, a dough mixer and they had something special which we never had before, I saw a machine there, a Thompson machine.

Q Was that the first time that machine --

A Never saw it before.

Q -- entered the industry, to your knowledge?

A First time I ever saw it.

Q Now, after you visited the shop, what did you do then with respect to the Union?

A Well, I went up to the Union. I called them up and made an appointment with them.

Q Who is "them?"

A I don't recall. Most of the dealings I had with the last Mr. Greenspan.

I don't know when he passed away, was it in 1964 or '65. But I do remember Mr. Laskowitz took over, and Mr. Amster took over, Morris Amster.

They're the ones, the two people I used to deal with.

Also, the Presidents of the Union, a one time, Moishe Skolnick, and Larry Horowitz.

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Q What, at the time you went to the Union, did you go yourself or did you go with other members of the Bagel Bakers Council?

A I couldn't get the fellows to go with me all the time. After all, they had to run their own shops.

When I needed a committee, I used to call them up, and they used to meet with me and meet with the Union.

Q What did you say to the Union and what did the Union say to you about the situation of the mechanized bagel shop?

A They told me it can't do the trade any good. They didn't believe what they -- the story I told them.

I said you people are Union people, you knew a bakery was going up, you mean to tell me you never sent a committee up there to look at the outlay of the plant?

You have eyes on all the other shops I rent. How come you never paid any attention to that shop.

Q And what did they do after you told them about this?

A As I said, I got a committee together, and they promised to give us some kind of relief.

The relief was they picked on one shop from the industry, which is Joe Rubenstein, this I remember vividly, up in the Bronx there, and they told the men to go up there and work without getting paid. And that lasted about a week, a week and a half, and the man refused to work without any pay after that, so he went back -- they promised different relief.

They were going to start picketing the different individual stores. I think they began picketing Waldbaum first.

Q Do you remember when that occurred?

A Remember what, sir?

Q Do you remember what year and what time that occurred?

A Well, it had to be the early part of '67. Or '68. I think it was '6 -- what year?

Q Was it prior to the lockout?

A Prior to the lockout.

Q Okay.

Now, how long did that picketing last, do you know?

A Well, first of all -- first they had a conference with Mr. Waldbaum, and he told me he'll cooperate.

After they start picketing, he told them he'll cooperate with them. He start taking in the merchandise from the people represented by Local 338, providing he -- he does the same thing to the other stores, like Bohack stores, the Big Apple stores. They didn't get the pickets.

He says if you -- if you picket them , then I'll be ablt to take in your -- the Bagel Bakers merchandise. Until then, he says I'll have to do what's good for my business.

Q Do you know that of your own knowledge, that's what he said?

A Right.

Q Did he say that to you?

A No.

That's what the Union people told me. I didn't get involved in that.

Q Now, did there come a point in time when you went back to the Union, and told the Union that the steps that had been taken, were sufficient or insufficient, for purposes of your Council?

Were you satisfied with the measures that were taken?

A I wasn't satisfied at all.

Didn't do us any good.

Q What did you do then?

What happened after your --

A I think the contract expired at the time, and we started to negotiate a new contract. And we wanted to get relief.

Q Now, do you recall discussing frozen bagels at that time?

A Well, the frozen bagel had started at about the same time, before, at the W & W. That started there from out in Connecticut in Lender's Bagel. Able Bagel came in before Lender's.

They came into the market I think as early as in 1966.

Q Did you make known managements' position with respect to these frozen bagels at that time, to the Union?

A At that time they promised me they're getting in touch with the Mr. Kraulstein, he was the president of the International at that time.

He wasn't the president of the International, he was the president of Local 3, then the manager with the International.

He'll get in touch with him, and he'll work things out, because he represented Able's Bagel and Lender's Bagle at that time, because Local 338 couldn't do anything with them.

Q And who told you that?

A Mr. Laskowitz told me that.

Q Now, following that conference with Mr. Laskowitz, did you again go back to the Union and tell them that you still had problems with these areas?

A Yes.

And they told me they're still walking for Mr. Kraulstein to do something about it.

Q Did you fix a point in time when that conference took place?

A That took place at the end of '66.

Q Did anybody go with you --

A No.

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Q In that conference?

A No.

Q Now, subsequent to that time, did you have any other conferences with the Union, with respect to either the Lender Bagels, the frozen bagels, or the mechanized shop problems, with regard to those problems?

A As far as I can remember, they kept on promising things, they're going to do things, and they never done anything about it.

Evidently they couldn't do anything about it.

Q Do you know whether the Union had any special meetings with respect to this, as to their entire membership, or major segments of their membership?

MR. APPELL: Your Honor, at this time I'm going to object to further questions along this line.

I don't believe they have any probative value whatsoever, particularly with respect to what the Union did.

MR. SISKIN: Your Honor, this is the man who was intimately involved with the Union, as managements' representative.

If anybody would have knowledge, this man would.

JUDGE ROSE: It's not a question of knowledge, Mr. Siskin.

It's a question of what is it supposed to prove?

MR. SISKIN: We're showing, YOur Honor, the status

47 and address for the record.

THE WITNESS: David Bork, B-O-R-K, 144-27 78th Avenue, Flushing.

DIRECT EXAMINATION

Q (By MR. Siskin) Mr. Bork, are you presently associated with a -- in the bagel industry?

A Yes.

Q How long have you been associated in the bagel industry?

A 1947.

Q You started in 1947?

A Yes.

Q Did there come a time when you opened up your own shop?

A Yes.

Q When was that?

A About a year later.

Q And just prior to January 1, 1967, were you associated with certain bagel shop or shops?

A I was an employee in '67, in January of 1967 I became an employee.

I was not an Employer anymore.

Q Was the name of your shop D&H?

A Yes.

Q And were you an officer of that shop?

A Yes.

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Q When did you become an owner in that shop?
A In the -- in 1948.
Q I see.
Did there come a time when you joined the Bagel Bakers Council?
A Yes.
Q Can you tell us that point?
A I --
Q When did that occurr?
A Probably at the time the shop was opened.
Q Were you on the executive board of the Bagel Bakers Council?
A Yes.
Q And were you personally familiar with conditions in the bagel industry, for the years 1966, '67 and '68?
A Well, I could answer more up to '66. Up to the end of '66.
But I knew the condidions in '67 and '68.
Q Did anything happen in '67 and '68, which would negate any of the statements just made about knowledge of the industry?
A No.
Q Did there come a time in 1966, when your Council made known its position about certain technological changes that were occurring in the industry, to the Union?

49 A Yes.

Q And can you tell us what the position of the Council was, to the best of your recollection, with respect to the Union and the problems that had arisen in the industry, on technological improvements?

A On a few of the visits to the Union, I was a member of what we called the Trade Committee.

We met with their Trade Committee, and we kept telling them the seriousness of the outside bagel, that it's affecting our trade. On several occasions, during '66.

Q And did those conditions affect your business, also?

A Very much.

Q What was the exact title of your business at that point?

A Exact --

Q '66.

What was the name of your business?

A D & H Bagel Bakery, Inc.

Q And can you tell us what conditions had existed in your business, in 1966, in your own business?

A Well, the beginning of '66 wasn't too bad.

But as the months got on, -- I can give you numbers that I know what I baked at the beginning of the year, and at the time that I closed the bakery.

Q When did you close the bakery?

A In December of 1966.

Q And can you tell us what conditions prevailed in your business, from the beginning of 1966 to the time you closed up D & H, in 1966?

A I was strict wholesale bakery.

There was no retail involved. And it started to deteriorate to such a point that I couldn't stay open anymore.

When I say wholesale, I mean where I didn't sell directly to the customer. I sold it to a jobber, who in turn sold it direct.

Q Now, who were the jobbers that you sold to?

A Webster Baking, Long Island City, and Belman's Bakery, in Richmondhill. Both in Queens.

Q And will you tell us what the conditions were that led to the closing of D & H Bagel Bakery, Inc.?

A Well, those two customers, which was the bulk of my baking, gave me orders -- let's say they did not cut me out entirely, but they gave me a fraction of the orders which I was serving these customers, say, for 10, 12 years, and I knew more or less what they were taking in everyday. They just gave me a token order.

Q Did you talk to them about why they weren't buying from you in the same ratio as they had done before?

A Yes.

51 They told me to meet the price, and you got it. You'll get the balance.

Q Did they tell you who had a different price?

MR. APPELL: I object.

Counsel can ask the witness what took place in these conversations.

JUDGE ROSE: Right.

Please, Mr. Siskin.

Q Will you tell us what was said to you and what you said to the --

A I went to these owners --

Q To these jobbers?

A I went to the owners when the orders dropped so drastically. I went to these owners, and I asked them what happened.

So, they gave me, well, if you can meet this figure, you can get back the order.

But I could never meet that low figure that they quoted me.

Q What was that figure?

A They wanted -- getting bagels for about 40¢ a dozen.

Q Where was this shop located?

A My --

Q Your shop?

A My shop was located in Richmondhill, Queens.

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Q And were you the sole owner of that business?

A No.

It was a corporate entity.

I was the president.

Q Did you own the business at that time?

Did you own the stock of that corporation?

A All?

Q Yes, all?

A Yes.

Q All of the stock?

A Not all of the stock.

Q All right.

Who else was an owner in that business?

D & H?

A My -- the H part. My brother-in-law.

Q Now, can you tell us when you physically closed out D & H Bagel Bakery, Inc.?

A To the best of my recollection it would be December -- about December 1st, 1966.

Q Did you have any retail accounts at all in 1966?

Q You mean stores?

Q Yes.

A Yes.

Q Well, I mean retail -- did you have customers who walked in off the street?

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A No.

There was no retail. It was like a factory.

Q And do you recall when in point of time you lost the major bulk of your business, in D & H?

The major bulk of your customers.

A It started, I would say, about May of '66.

Q And did you ever discuss this problem, or the pending problems, with the Union, either yourself or in conference with your Council?

MR. APPELL: Objection.

JUDGE ROSE: What's the basis, Mr. Appell?

MR. APPELL: What relevance is it whether he discussed it with the Union?

JUDGE ROSE: Mr. Siskin?

MR. SISKIN: Yes.

This goes, Your Honor, to the question of conditions in the industry, with respect to the loss of the wholesale accounts, and the loss in volume at that time by the Members of the Council.

JUDGE ROSE: Objection sustained.

Go on.

Q (By Mr. Siskin) Do you know what your --

Withdrawn.

Did you bring certain tax returns here today?

A Yes.

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Q D & H Bagel Bakery, Inc.?

A Yes.

Q Did you bring this return?

MR. SISKIN: Mark it for identification.

United States Corporation Income Tax Return, dated November 1, 1966, and ending October 31st, '67, of D & H Bagel Bakery, Inc.

(Respondent's Exhibit 37 was received and marked for identification, as of this date.)

Q (By Mr. Siskin) Did you bring this corporation --

JUDGE ROSE: Excuse me.

The dates November 1, '66, October 30th, '67?

MR. SISKIN: That's what it appears to be, Your Honor.

It isn't exactly clear. That's what the fiscal year must be.

Q (By Mr. Siskin) Mr. Bork, is this an exact copy of the original tax return that was filed with the Internal Revenue Service?

A Yes, sir.

Q And to be best of your knowledge, was it based upon your books and records, as you had given them to the accountant at that time?

A Yes, sir.

Q Did you sign the original of this return, and mail a copy of it to the Internal Revenue Service?

55

A I believe I did.

Q Okay.

MR. SISKIN: I'm going to ask that this be introduced in evidence.

MR. APPELL: No objection.

JUDGE ROSE: Respondent's 37 is received.

(Whereupon, the above referred to was received and marked Respondent's Exhibit 37 in evidence.)

Q (By Mr. Siskin) Did you eventually sell this business, or did this corporation sell this business, Mr. Bork?

A No.

It just closed. Just closed it.

Q What happened to the equipment?

A remained in the place.

Q Did you abandon the equipment?

A I didn't abandon it. Several years --

The ovens that I had, couldn't be moved. They were part of the building.

I didn't have what we commonly call a revolving oven. I had the old fashioned brick lined oven. Not revolving.

In other words, you couldn't move it even if you wanted to.

Q And so, therefore, is it fair to say that you were unable to sell any of your plant and equipment?

A About three, four years later, I sold a dough machine.

Everything was left as is. I just put a lock on the door and walked away.

Q Did you own the building?

MR. APPELL: I object.

What's the relevance.

A I owned the building.

JUDGE ROSE: Overruled.

The relevance appears to go to the question of successorship.

MR. APPELL: Your Honor, I think that's been found already by the Court.

JUDGE ROSE: Has it been?

MR. SISKIN: Yes.

That I would concede is, I believe, a past finding.

But I'm not going to that, Your Honor, I'm going to conditions in the industry at that time.

I believe there's prior -- there is authority that says they were a successor.

JUDGR ROSE: Okay.

Objection sustained.

Go on, Mr. Siskin.

Q (By Mr. Siskin) Now, what were the -- what was the sales trend in this shop, through and including the closing date and the two years prior to this, in D & H Bagel Bakery?

Were the sales down?

Was the trend down?

A The trend was down, steadily downward.

Q Did you, in the course of your being an owner of D & H Bagels, did you ever go to any of the mechanized shop or shops, that prevailed at that particular point in time?

A I --

Q Did you ever go to W & S, Throgs Neck?

A No, sir.

Q Did you ever see the Thompson Machine that made bagels in mechanized form?

A Yes, sir.

Q And will you tell us when you saw that machine?

A I saw it in '66.

Not in W & S.

Q And where did you see it?

A I --

Q Do you recall?

A In Flushing.

Q Was that a machine which produced bagels by machine, as contrasted with hand craft baking?

A Yes.

Q Did you go with anybody else in the Council?

A No.

I saw the machine in another place, too, but I can't recall the date. In Nanuet.

Q Now, subsequent to your going out of business with D & H, did you go to work in any other bagel shop?

A Yes.

Q What was that?

A Pops Bagel.

Q Were you an officer of Pops?

A No, sir.

Q Were you an owner of Pops?

A No, sir.

Q Have you ever been an owner of Pops?

A No, sir.

Q Have you ever been an officer of Pops?

A No, sir.

Q Now, did you ever participate in any discussions with the Union, with respect to any ot the factors that you've discussed here today, mechanization, or related questions?

MR. APPELL: Objection.

JUDGE ROSE: Sustained.

Q Did you ever discuss any frozen bagel problems with any members of the Union?

MR. APPELL: Objection.

JUDGE ROSE: Sustained.

Q Did there come a point in time when your Council met with the Union, with respect to any of these problems?

reopen your case to prove the back pay specification. I should think.

I just can't get over the fact that you are asking me to preclude the Respondent from having a reasonable period of time to form his defense on a specification that amounts to in excess of 90,000 dollars.

We will be in recess until 1:30.

I am going to ponder this.

(Lunch recess taken at 12:01 P.M.)

JUDGE ROSE: We will be on the record.

Well, with regard to this matter of recessing the hearing, Mr. Siskin, I think you have a well taken point frankly, and due process would require that.

However, I am not going to allow it for this reason, the reasons that are not the Respondent's fault, and which reasons which I don't know or understand -- more than five years has elapsed since the Circuit Court entered its judgement enforcing the Board's order until the present time.

I am advised administratively that as a result there's in ordinate delay.

The Circuit Court entered the mandamus injunction against the Board requiring the Board to act forthwith in determining thsi back pay matter.

I therefore, feel it would be inappropriate for me to recess the hearing in view of the fact that -- of that order.

I will, however, -- you can be assured I will take into consideration that fact that you have not had an adequate opportunity to prepare your defense and file an answer with regard to this specification in ruling on the substance of that specification.

And if it appears to me, as I decide this case, that as a result of you not having appropriate time to meet the specification, I will reject it.

I think that's the best I can do under the circumstances.

MR. SISKIN: Do I understand, sir, that I am bound to submit an answer by tomorrow with respect to these?

JUDGE ROSE: No.

You are not bound to submit an answer by tomorrow.

You should have your answer on file before the close of the hearing, but I don't think will be tomorrow.

MR. SISKIN: Okay.

I strenuously object, Your Honor.

I appreciate Your Honor's good intentions on the subject and sincere approach.

However, it will be unduly prejudicial to Respondent's to proceed at this point.

We have no way of caucusing with our 19 or 17 defendant Respondents, and it will unduly prejudice the Respondent's, Your Honor, in its defense to this matter.

May I add further that all the evidence to this is with Respondents and the union.

The union is on record through its delegate that he has "been unable to ascertain any of the records of the union," Mr. Levi has testified in this proceeding, and I can put it on the record, that the conversations with the union and the conference with the -- that he had with the union and any members he had played a substantial part in its specifications.

And that's on the record, by the way; and I again reiterate that I renew my request for an additional adjournment.

JUDGE ROSE: Very well.

Anything else?

MR. APPELL: Your Honor, I should like to state the we believe that we should go forward for the reasons that I stated before the lunch break.

I don't believe this determination unduly prejudices the Respondent's for the reasons I stated earlier.

JUDGE ROSE: I would have no hesitancy in granting reasonable time for the Respondent to prepare his defense with regard to this matter which I consider to be one of substantial substance but for the fact there has been an order by the Circuit Court in this very case.

Let's proceed, gentlemen.

MR. SISKIN: You have your witnesses?

MR. APPELL: Yes.

I would like to recall three witnesses briefly, Your Honor, on this particular point and one would be Mr. Sapadin.

JUDGE ROSE: Is this a witness who has previously testified?

MR. APPELL: Yes, Your Honor.

JUDGE ROSE: Have a seat.

Let me remind you you have been previously sworn in this matter and you are still under otaht.

Whereupon,

SAUL SAPADIN

having been previously sworn, resumed the stand and testified further as follows:

JUDGE ROSE: What's your name again?

THE WITNESS: Saul Sapadin.

MR. APPELL: Your Honor, at this time I ask the -- that the Reporter mark these two W-2 Forms as General Counsel's Exhibits 15 and 16 respectively.

(Whereupon, General Counsel's Exhibits 15 and 16 were marked for identification.)

JUDGE ROSE: General Counsel's Exhibit 1-N is received.

(Whereupon, General Counsel's Exhibit 1-N was received in evidence.)

DIRECT EXAMINATION

JUDGE ROSE: 224.

THE WITNESS: That was under the old contract.

Where they continued beyond the contract on the working basis because they were negotiating, that I couldn't tell you either.

I just don't know.

JUDGE ROSE: Okay.

Mr. Silverman, on the back pay specification involving you it shows that in 1966 you had total earning of $16,791.04.

My question to you is, do you know of any way, using that figure, that we could calculate how many days you worked?

THE WITNESS: No way at all.

It's impossible.

Of course we worked on a piece work basis, and each bakery was different, and weekends and middle of the week were different.

Like in the middle of the week we could make 100 boxes and I could go into one bakery, a small bakery and you needed 300 boxes, 400 boxes -- there's no way to calculate that.

There's no way how many days or anything.

JUDGE ROSE: Well, during 1966 do youhave a judgement as to how many days a week you did work and how many weeks in the year you worked?

THE WITNESS: Yes.

During 1966 I worked between five and six days a week.

JUDGE ROSE: And when you say days, this is actual days of the week?

THE WITNESS: Actual days -- I am not talking about amounts at all now.

I went into work for User.

I went to work for him.

I went into work for the next man.

Each man a different day, that's what I am talking about.

I am not talking about I made 100 boxes for -- or 400 boxes.

JUDGE ROSE: You worked five to six days a week?

THE WITNESS: Yes.

JUDGE ROSE: How many weeks a year?

THE WITNESS: It was 51 weeks a year.

JUDGE ROSE: 51 weeks?

THE WITNESS: Passover we didn't work.

Week of Passover.

JUDGE ROSE: How about when you took vacations?

Did you take vacations?

THE WITNESS: I didn't take vacations.

Some people did.

JUDGE ROSE: Okay.

That's all.

Anything further?

MR. SISKIN: Yes.

RECROSS EXAMINATION

Q (By Mr. Siskin) Now, with respect to a computation, how much you claim as a discrimnatee,based upon what you would have been entitled to for vacation pay and holiday pay for the year '67, you have already testified, have you not, that you worked four days a week?

A Approximately.

Q Could it have been five some days -- some weeks rather?

A I don't know.

There's a possibility that somebody would get sick and they would send me in a day because I can't remember ten years ago if they gave me an extra day.

I just can't remember that.

Q Where were those records kept as to how many days a week that you worked?

Were they kept in the union?

A No,

Q Did the union -- didn't the union --

A Wait, just a minute.

I am sorry.

Let me correct that.

I am not sure.

As I remember it, no -- even then -- they wanted the amount of boxes.

I don't think they had the amount of days.

Q Isn't it a fact that the union sent out auditors to the shops to verify the computation of the days and amounts?

Isn't that a fact?

A I am not saying that, no.

I don't know.

All I know is this, I told you what I knew before, that was a shop steward they gave me a form, and I filled out how much boxes they had on Monday, how many boxes I had on Tuesday, how many boxes I had on Wednesday.

They did not ask me to -- the amount of minutes as I recall it.

All they asked me was how many boxes did they make each day.

Q If one wanted to from the union verify whether an employee was getting paid the right amount of vacation and holiday pay during the year '67 or '68 how would one do it but without checking the number of days?

A The only way I can see they would did it if they had the check from each place and deduct from each day 3.50.

Q Well, isn't it a fact that the union did vouch and did verify the computation of vacation and holiday pay for its employees?

A In '67, after February --

Q '67 and/or '68?

A Did they verify the vacation?

Q Yes.

A I don't know anything about that.

Q Now, did you ever go down to union headquarters in '67 or '68?

MR. APPELL: Objection.

JUDGE ROSE: Overruled.

A Yes.

I went down to the union.

Q Did you see any union records maintained in your name as to roster, seniority or any records like that?

A I didn't see the records, no.

Q Do you know whether they were maintained in '67 and '68?

A I don't even remember.

I don't even know.

Q Who would have kept those records, can you name the employees that you knew during that time?

Union officers?

A As far as I know they knew which places I worked on eacy time -- each day that I worked.

In other words, like I specified before, every Monday I worked in this place, ever Tuesday I worked in other place and every Wednesday I worked in the third place.

It was the same place each Monday, each Tuesday, each Wednesday, whatever the days were.

MR. SISKIN: I have no further questions of the witness.

JUDGE ROSE. Mr. Appell?

Q (By Mr. Appell) Mr.Silverman, can you approximate the date between the three dollar and 50 cent formula went into effect for vacation and holiday pay?

A I am not sure.

I think it was the early part of '67.

It may have been May.

But I don't know.

It's an assumption.

Q It was after the lock out started?

A Oh, yes.

Definitely.

MR. APPELL: No further questions, Your Honor.

MR. SISKIN: No further questions, Your Honor.

JUDGE ROSE: You are excused, Mr. Silverman.

(Witness excused.)

JUDGE ROSE: Call you next witness.

MR. APPELL: Mr. Ralph Breier.

JUDGE ROSE: Has he previously testified?

MR. APPELL: Yes.

Whereupon,

ture that is on the bottom for the Bagel Box?

A You want to show it to me?

(handing document to witness.)

A No, I don't.

Q Did you sign it for the union?

A Did I sign it, no.

The financial secretary usually signed it.

Q Is this -- is his signature on here any place?

A No.

It didn't have to be.

MR. APPELL: I object, Your Honor as not --

JUDGE ROSE: What ground?

MR. APPELL: It's not properly authenticated.

JUDGE ROSE: Do you object to its authenticity?

MR. APPELL: I cannot vouch to it.

JUDGE ROSE: Do you object to it, Mr. Appell?

MR. APPELL: May I have a moment?

(Pause.)

MR. APPELL: Your Honor, I will withdraw my objection.

JUDGE ROSE: Very well, Respondent's Exhibit 38 is received.

(Whereupon, Respondent's Exhibit 38 was received in evidence.)

Q (By Mr. Siskin) Now, during the time that you were in the union as an officer, did you go to visit any of the non union shops, any of the machine shops that were in existence?

A Yes, I did.

Q Can you fix a point in time when you went to see any particular shops and give us thenames of those shops?

A Well, one was in -- around the summertime of 1966.

The name of it was the W&S or Throggs Neck Bridge Bakeries we called it.

It was located in the Throggs Neck section of the Bronx.

And I was on a committee with Lawrence Horowitz and Morris Amster, Sammy Greenspan and Harry Laskowitz.

We tried to organize that bakery, because we were told it's completely automated.

And when I went in there I met a man named Ben Willner, who was the public relations man for this organization, and he showed us about 100 dollars worth of automated bagel machines, an oven, two bagel machines, proof boxes, everything where you would eliminate man.

In fact he told us -- didn't tell us, he showed us he had women working there, he paid them at that time, this is over ten years ago, a dollar and a half an hour.

So we tried to organize him at that time, and we told him about our experience as bagel bakers going back to 50 years or more.

He says you don't need it.

He had women doing it for him.

And he was going to take control of the City of New York -- wasn't interested in retail or anything like that, strictly wholesale.

That was during the summertime.

And we reported this back to the union in the executive board and at a general meeting.

That's why I asked for the minutes.

This was reported to the membership of Local 338 that there was automation coming into the industry.

And this was during the summer of '66.

And by the end of the summer he had crept into the industry taking one supermarket after another under contract which these employers at that time never had because they were dealing with them for 40 or some odd years without a contract.

This man went in at half price.

Q Will you tell us what action the union took while you were an officer of the union at that particular time?

MR. APPELL: I object.

JUDGE ROSE: What basis?

MR. APPELL: I don't believe what the union did is relevant to the issues at hand.

JUDGE ROSE: Overruled.

Proceed.

A This plant was located in a place that was so out of the way for -- where people wouldn't go to shop there.

It was like a factory out in the woods somewhere.

And he had the trucks to deliver it to the supermarkets.

So at that time we got in touch with our labor lawyers, Cooper,Ostrin,DeVarco, and they told us to make out placards, we would started secondary picketing or what they call educational picketing and go in front of the supermarkets who dealt with these people.

Now, when you go in front of a supermarket and they are selling bagels, which is just one of thousands of items they didn't care too much to see a picket in front of their store so they'd come out and talk to us.

But there again it entered into economics, the price was so ideal for them, where our old employees were selling it to them from 50 some odd cents a dozen, they went completely in half to a quarter.

And there was -- it was very ineffective, the picketing that we did.

So he got a foothold into the City of New York.

And there was no way of dislodging him.

Q Now, did you see the machinery that was being utilized in that plant?

A Yes, I did.

Q Will you tell us what you saw?

A Well, the name of the bagel machine was the Thompson Bagel Machine, where you had two men on the bench making it by hand.

Here you needed was one inexperienced kid, and he would just take a piece of dough and feed the machine.

And the machine did the rest.

All you had to do was just take it and put it into the box, the finished bagel, and put it in front of the oven and they had a man there just feeding the oven.

There was no bakers involved.

All you needed was somebody to feed the equipment.

You didn't need any experience whatsoever, and we were willing even to settle with him on an hourly basis figuring well,, for the future we will go from piece work to an hourly basis on machinery.

But he had workers there for a dollar and a half an hour and what we were shooting for was completely out of range to him.

He just kept us out.

Q What was the nature of the reports you made to the union?

A Well --

Q Was it a written report?

A No.

This was at a general meeting.

First an executive board meeting and then we went before the general membership and related exactly what we saw.

And that automation is in the industry and it's coming in.

And it was a trend, because at that time quite a few members saw what was happening, they saw the handwriting on the wall and they got up and left New York, including my brother, who is out in Cleveland today.

Q Now, can you tell us whether at that particular point in the latter half of 1966 you went to any other shops that were automated?

A There were somethat -- once this fellow got into the City of New York, they started bringing in bagels from out of town, Gourmet I think was coming in from Baltimore, Abels and Lender of course you have heard of, and from Jersey City they were coming in.

It seems like the dike just broke wide open and everybody kept coming in at that time.

This was at the latter part of '66.

MR. APPELL: I move to strike it seems like and everything after that.

JUDGE ROSE: Overruled.

Q Did there come a time when in 1967 you made any report to the union?

A Well, I was on the negotating committee, the end of '66 and the early part of '67, in January, and during that period of time we were negotiating with the present employers there, the council, whoever else was present there.

And you know, going back ten years, it's a very difficult thing to remember verbatim.

But they were up against a stone wall at that time with the production end of it, and we, as union men, we were to be very honest with you, we were worried about our jobs because the production went way down and we were strictly piece workers at that time.

And the work was cut right in half at that time.

We walked into shops and where I would take home 3 and 4 hundred dollars a week, I was down to 2.

And the amount of men that was in my job remained the same.

So we were trying to divide some system at that time where we wouldn't need as many men to make the amount of production that prevailed at that time.

But there was an impasse at that time, and we recommended to the membership to strike.

That was in January of '67.

And the membership meeting, you know, we recommended to the executive board for a strike.

Then we went before the general membership and told them what had happened.

There was an impasse.

And they gave us full power to full a strike whenever we wanted to, since there's no contract, there's no work.

Q Now, did there come a time when during the time that you were a union official or officer or served on any of the committees, that concessions were made to certain employer shops?

A Yes, there was.

Q What was the reason -- did you know -- you know why that concession was given?

A Well, some of the union men started to see a trend, and they were concerned, so they'd open up bakeries in '66, and they allow the employer to work and to make whatever he wanted to, and where they would send into other employees a set, three men and a kettleman, here they would only send in one man, which saved him quite a bit of money on his vacation, holiday, welfare, pension, and whatever else they were paying for on a production basis.

Q Do you know when that occurred?

A In '66, towards the latter part of it.

Q And can you tell us which shops those were, to the best of your recollection?

A Well, one remains in my mind that was the one in Merrick, Jerry Steuerman.

He owned it at that time.

Artie Goldberg opened up one in Rockaway Parkway in Brooklyn and another one in East Meadows, Goldberg, and I think a Charlie Kaplan -- it was Charlie Kaplan and Alan Elkin opened up in Wantagh.

Q Did this all occur while you were an officer of the union?

A I was an executive board member, which is considered that.

Q And did there come a time when other concessions were given by the union during the time you were an executive, during the time you were an official?

A Not that I remember.

Q Now, subsequent to your termination of services with the union, did you acquire a bagel shop?

A Before I left the union?

Q After you left the union.

A Yes, I did.

Q What was the name of that bagel shop?

A Bagel Town.

Q When did that occur?

A In February of '67.

Q All right.

A Because I also saw a trend.

JUDGE ROSE: Off the record.

(Discussion off the record.)

JUDGE ROSE: On the record.

Q (By Mr. Siskin) Mr. Skolnick, during the years that you were in the union were you familiar with the procedure in farming out work to the employees?

A Yes, I was.

Q And can you tell us what the prevalent and orthodox procedure was during the time that you were in the union?

A The business agent -- the union was in control of all the work and the business agent would dole out the work to the members as he saw fit.

It was no such thing as a seniority basis or anything like that.

It was who you knew, what you knew.

Every politician, he got the best work and the most work.

And the rank and file member, he became the fireman of the industry, when one of us so-called politicians up there would get sick or vacations, the would fill in.

You can work -- well the first year I was in the union I had 31 withholding statements.

And the standing joke up there was that I was stupid because I filed them all at one time, I should have lost half of them.

Because this was the standing procedure up there.

They had five and six and seven.

The Internal Revenue would overlook it.

Q Now, limiting yourself to what transpired in the year '65 and '66 and '67, to the best of your recollection, will you tell us for those years, as you recall them, how you worked -- how work was farmed out for those years?

A Delegate would send out -- well, there were certain people that held steady jobs.

And the delegate would call a man up and tell him to report to such and such a bakery at a certain time and he would make a certain amount of work.

And there was some shops, they'd go into, particularly on a weekend, if they had like on a Friday 500 boxes, so he'd send in two men or three men to make the 100 and then after that, it took approximately three to three and a half hours for 100 boxes.

And then after that three new men would come in and then after that another three men would come in and after that another three men.

And on Tuesday we would see the employer up at the executive board complaining, he has some -- he has so many damn many workers up there that it was killing him.

So they would throw the contract at him and showed him we didn't have to make more than 100 boxes.

Q Now, did there come a time when there began to be an exodus of employees from the union while you were in the union?

A Yes,

Q And -- can you fix that point in time?

A Around the middle of 1966, around the srping, let's say.

Q Do you know of your own knowledge, at that point and through the rest of the year, how many employees left the union?

A At least 30 of them.

Q Now, what was the procedure used by the union to verify vacation pay and holiday pay?

Were you aware of any -- of that procedure?

A Yes.

Q Will you tell us what the procedure was?

A Well, the procedure on the vacation money was based on production -- on a production basis.

Q When was this?

A At all times before 1967.

Everything was based on production in every shop. The more a man produced, the more he paid into the vacation holiday money.

Q The more money -- the more management paid into the --

A Management, right.

All this money went into sort of a pool up in the local union and they were divide this up and sub divide the amount of membership into this pool.

That was the whole basis of the vacation holiday money.

One year we got more, one we got less.

If there was less mebers we got more.

In 1966 there was such a exodus of member in the middle of the year that left more money to split up between the rest of us.

Q Now, can you tell us how the system changed in '67?

A In '67 it started to change after I left.

Instead of production -- because there was no production, so they went from production basis to per day basis.

Q And is it fair to say, to the best of your knowledge, that if a man had worked for one employer three or four days or five days a week, there was never any compounding of that pay?

A No, they -- there wouldn't be.

Q Only one employer would pay one pay, right?

A That's right.

Q Per day under the system as it existed in '67?

Per day?

A I believe -- well -- I -- the production in the shop was far below what he was accustomed to working for.

Q And did he tell you that?

A He didn't have to.

MR. SISKIN: I am going to strike all of that.

MR. APPELL: Yes.

JUDGE ROSE: Anything further of this witness?

MR. APPELL: No, Your Honor.

JUDGE ROSE: You are excused.

(Witness excused.)

JUDGE ROSE: Call your next witness, Mr. Siskin.

MR. SISKIN: I call Mr. Herbert Knopp,CPA.

JUDGE ROSE: Raise your right hand.

Whereupon,

HERBERT KNOPP

having been called as a witness, and having been first duly sworn by the Judge, was examined and testified as follows:

JUDGE ROSE: Please be seated.

State your name and address for the Court Reporter.

THE WITNESS: Herbert Knopp, K-n-o-p-p, 61 Thadford Street, East Northport, New York.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Knopp, what is your occupation?

A Certified public accountant.

Q How long have you been a certified public accountant?

A Approximately three years.

Q And you are admitted to practice in the State of New York.

A That's correct.

Q And how many years experience have -- did you have prior to becoming a CPA?

A Approximately nine years prior to becoming a CPA.

Q So is it fair to say that you have had 12 years of certified public accounting experience?

A Yes.

Q Both as a CPA and as an employee?

A Correct.

Q And have you been engaged in your own practice?

A I have for the last six months a partner in a public accounting firm.

Before that I == that as an employee in a public accounting firm.

Q What is the name of that firm?

A The firm that I was a partner in was Knopp & Knopp.

Q And did you maintain certain records for a corporation known as Tri-Boro?

A That's correct.

Q What were those records?

A We kept general ledgers, we kept the record of all purchase bills, filled all tax returns at the end of the year both federal -- I should say federal, state and city.

Q And do you have the records for the period 1966 through 1971 here today?

A I do, sir.

Q Do those include tax returns and --

A Yes, sir.

Q -- and general ledgers and the like?

A Yes.

Q And are those -- these copies that you brought today known as office copies or work copies from which the originals were prepared?

A These are actually the originals which are kept as office copies.

Q I see.

And the copies so to speak are mailed to the Internal Revenue?

A Exactly.

Q And did you maintain the work sheets in your files?

A Yes, we did.

Q And did you maintain the ledgers in your own office during this period of time?

A We did.

Q They were kept in your office all during this period of time?

A Well, during the actual period of the year they were kept at the Bagel Bakery.

They were posted every month.

And at the end of the year when the tax returns were filed, the general ledgers was taken and put as a permanent record with our files.

Q Have you been familiar with these books and records of Tri-Boro Bagel and Company during the period of time 1966 to 1971?

A Yes.

Q And did your office sign the tax returns?

A Yes, we did.

Q Did you perform audits on the books and records as part of your job function?

A Yes, we did.

MR. SISKIN: I am going to ask that these be marked for identification, 1966 tax returns of Tri-Boro Inc., 1967 Tri-Boro, Inc., 1968 Tri-Borl, Inc.

JUDGE ROSE: Mark those Respondent's Exhibits 40, 41, 42, sequentially.

(Whereupon, the above-described documents were marked as Respondent's Exhibits 40, 41 and 42 for identification.)

Q (By Mr. Siskin) And was it the practice of -- in your firm to prepare the work sheets and from the work sheets to file these tax returns?

A Exactly.

Q So that if one were to look at your work sheets --

A It would correspond --

Q Correspond with the tax returns?

A Right.

Q If one were to look at the work sheets one would verify that the general ledger figures were transcribed into the work sheets is that fair and correct?

A Right.

MR. SISKIN: I am going to offer these in evidence, Your Honor.

JUDGE ROSE: Any objection?

THE WITNESS: Can I just ask one question?

MR. SISKIN: No, you can't, I am sorry.

MR. APPELL: May I have one question on voir dire, Your Honor.

JUDGE ROSE: Very well.

VOIR DIRE EXAMINATION

Q (By Mr. Appell) Mr. Knopp, are these figures prepared in your own hand?

A I believe the first year mentioned was prepared by somebody else.

The next two years I actually prepared personally.

Q Someone on your staff the first year?

A Yes.

Someone that worked on our staff.

MR. APPELL: I have no objection, Your Honor.

JUDGE ROSE: May I ask you what the purpose of the offer is, Mr. Siskin?

MR. SISKIN: Yes.

To show that those are the sales, financial data and loss and volume figures for the respective years, loss sales and labor dollars as well for those years reflecting the piece work difference between the three years.

JUDGE ROSE: Okay.

Respondent's Exhibits 40,41 and 42 are received.

(Whereupon, Respondent's Exhibits 40, 41 and 42 were received in evidence.)

Q (By Mr. Siskin) And were those tax returns prepared from what are known as ajusted working sheets?

A Yes, sir.

Q Adjusted trial balance?

A Right.

Q And were those trial balances reflecting -- mirrow reflections of the general ledger prior to adjustment and then an adjustment was made, which is normal accounting adjustments?

A Yes.

Q Coming to the figures that are shown on the tax return?

A Yes.

MR. SISKIN: I offer as Exhibits adjusted work sheets for fiscal year ending 1-31-67-68-69.

(Whereupon, the above-described documents were marked as Respondent's Exhibits 43,44 and 45 for identification.)

Q (By Mr. Siskin) And, Mr, Knopp, is it the prevailing practice in the accounting profession that these adjusted work sheets reflect the composite summary of transactions for each individual account during the year?

A Yes.

That's exactly right.

Q So that if one were to look at the -- at sales in any one of these work sheets, it would be reflection of the -- of total sales for the fiscal year ending?

A Yes.

Q That period of time.

That's corrected by your audits?

A That's correct.

MR. SISKIN: I ask these be introduced in evidence, Your Honor.

MR. APPELL: Your Honor, if I may ask just a question of the witness?

JUDGE ROSE: Yes.

VOIR DIRE EXAMINATION

Q (By Mr. Appell) Which of these documents, if any,

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are prepared in your own hand?

(Handing.)

A These are the work sheets prepared by myself and this third one was prepared by a staff man which correspond with the tax return that was also prepared by the same person.

Q These two were prepared by yourself?

A Yes, sir.

MR. APPELL: Your Honor, the witness is referring to Respondent's Exhibits 43 and 5.

Q And who prepared 44?

A This was a staff man who was actually on the job the year that I was not there.

MR. APPELL: I have no objection.

JUDGE ROSE: Respondent's Exhibits 43, 44 and 45 are received.

(Whereupon, Respondent's Exhbiits 43, 44 and 45 were received in evidence.)

Q (By Mr. Siskin) Now, did you maintain certain ledger sheets for particular accounts or did your office maintain to be more correct?

A The ledger sheets that you are referring to, they were actually maintained by a bookkeeper at the establishment, at Tri-Boro.

Q And did you post from these ledger sheets -- cards to your work sheets?

A Yes, I did.

Q And did you bring certain of these ledger cards for the subject years here today?

A Yes, I did.

Q And are those the ledger cards called purchases-bakery for the years -- for the year 1968 and purchases for 1967 and purchases for 1966?

A Yes.

Q And are they so to speak an analyzed or railroad or spread out on the ledger cards so they reflect the different kinds of purchases?

A Yes, that's right.

Q And they aggregate a total which ties in or reconcils with your work sheets, do they not?

A That's correct, yes.

Q I am going to offer as Exhibits for identification the purchase accounts for 1967, '68 and '69 -- excuse me, purchases in 1968, '67 and '66.

(Whereupon, the above-described documents were marked as Respondent's Exhibits 46, 47 and 48 for identification.)

JUDGE ROSE: We are off the record now.

(Discussion off the record.)

JUDGE ROSE: Back on the record.

Mr. Appell, any objections?

MR. APPELL: No.

JUDGE ROSE: Respondent's 46, 47 and 48 are received.

(Whereupon, Respondent's Exhibits 46, 47 and 48 were received in evidence.)

Q (By Mr. Siskin) Now, if one would take the total of, for example, baked goods inthe purchase account or raw materials in the purchase account and paper goods in the purchase account, one would get the same total as the -- as is summarized in the work sheets, isthat not correct?

A That -- this would lead to the unadjusted figure.

Q Correct.

And then adjusted would be made to the work sheet --

A And then they would have the final figure that appears on the tax return?

Q Now, would it be fair to say that in your opinion the payroll figures in this corporation for the respective fiscal years would bear some sort of ratio with the sales figure?

A That is correct.

Q Would that be true to the extent it represented sales of bigger materials?

A It's really difficult to say because we really have no break down of the sales per se between bagels and dairy.

That I think we could more or less find out through the purchase figure more than the payroll figure.

Q But would it be fair to say that based upon your knowledge as an accountant or as a CPA for this particular concern, that you could express some sort of rough ratio?

A Yes.

Q Between payroll and sales?

A Yes.

Q And that would be payroll utilized in producing bagels as distinguished from payroll produced in store keeping or warehousing, etc?

A Correct.

Q And is that generally true in the accounting that one could draw a ratio in a piece work industry between payroll and sales?

A Yes, it would be so.

Q And is it fair to say that if one knew the sales figure in this industry or in any industry, one could pretty much express within a few percentage points a direct labor ratio utilized in producing the articles?

A Yes, we could.

Q And can you state with any degree of certainty that if one knew the amount of sales in a particular period of time, be it a fiscal year or a month or a period of a quarter, one could predict how much payroll could be expected to be generated by that sales figure?

A That's correct.

Q And is it fair to say that management in this or any other bagel concern or any -- or in any concern could be expected to hire only the labor that would be associated with the sales that it could generate?

MR. APPELL: Objection.

JUDGE ROSE: What's the basis?

MR.APPELL: These questions are speculative.

MR.SISKIN: Your Honor, I qualified this witness as an expert.

I think the witness has testified he maintained the records, they were in his possession and he was the accountant that summarized these work sheets.

JUDGE ROSE: Let me have the question again?

(Record read.)

JUDGE ROSE: I will sustain the objection.

I think that goes byond his area of expertise.

Q (By Mr. Siskin) Is it fair to say that based upon the sales that could be expected by this store certain payroll would be generated and sustained by the store?

A Yes, it could be.

Q And do you know the ratio between sales and payroll for this particular store?

A I would have to check with the records.

I don't have it off the top of my head but it's indicated by the records, which is a pretty constant percentage all the way through the different years, and would tie out with the sales,in direct proportion.

Q I am going to ask you to consult these records and tell us what that might be?

(Pause.)

Q Have you reviewed those work sheets and tax returns, ledger sheets?

A Yes.

Q Could you tell us what the correlation would be, in your opinion?

A Talking dollar and cents now, I'd like to go through the three years just to give a idea of the sales to the actual production or the -- or to the actual salaries.

Q And would that sales be only bagel sales?

A No, it wouldn't.

Q It would be total sales?

A Total sales.

Q But in total sales ran constantly or -- you could pretty much establish a norm, could you not?

A Yes, we could.

I believe so, yes.

Q Would you speak for each year?

A Okay.

The first year in question would be the year ending January 31st, 1967, which is == which basically takes in all of 1966.

We had total sales of approximately 400 and 16 thousand dollars, we had salaries of approximately 66,000 dollars.

Q It that bagel salaries?

A That would be bagel bakers salaries, that's correct.

Going on to the next year, 1968, January 31st, 1968, our sales dropped to approximately $229,000 and likewise our bakers salaries dropped to approximately 64 hundred dollars.

Going on to the last year in question, 1969, January 31st, the sales were grossed 278,000, and again the salaries approximately 67 hundred dollars.

Q Now, is there another correlation that you could make between purchase of raw materials and payroll?

Is that an independent correlation?

That's a second correlation, is it not?

A Yes, it would be.

We have a very definite trend in the purchase where the raw material purchase through these three years also took a drastic drop in relation to the total salaries.

And our purchase of dairy department, which was instituted after we had the -- this tremendous drop in bagel production, was reflected in a tremendous increase in the purchase.

Q But limiting yourself solely to the purchase of raw materials, of baking materials utilized by the bakers, could you draw a rough correlation for us as to each of those years?

A Yes.

Q Would you express that for the record?

A Okay.

Going back again to January 31st, 1967, to purchase of raw materials, was approximately $25,000 as opposed to bakers salaries of $66,000.

In the year January 31st, 1968 our purchase of raw materials was down to $29,000, and our salaries for bakers was about 64 hundred dollars.

And the third year in question, 1969, January 31st, our purchases of raw materials was approximately $28,000, and again the salaries for the bakers was about 67 hundred dollars.

Q Is it fair to say that either by direct labor to sales or direct labor to purchases one could get some rough ratio --

A Yes.

Q -- in a given situation as to determine the correlation factor between labor for bagel making and those particular items of expense?

A Yes.

Q And those particular items of sales?

A Sales, right.

Q Now, can you tell us what your records reveal as to when sales shifted from a bagel -- primarily a a bagel shop take a bagle plus something else shop?

A The records indicate that starting with the fiscal year that began February the 1st, 1967, our emphasis completely changed from a bagel production wholesale type of a place to more or less of a dairy store.

And the date would be approximately the beginning of the new fiscal year, which started February 1st, 1967.

Q And do your records reveal that if one were trying to analyze them?

A Through the sales.

Q And was that true for the fiscal year ending January 31st, 1969, as well?

A That's correct.

Q Have you ever done any cost analysis in what it cost to produce a bagel?

A No, I haven't.

Q Now, will you tell us what the financial results reflected for the three years as far as a final profit or loss for the company?

A Okay.

For the fiscal year ending January 31st, 1967, it reflected a profit of $2,056.30.

Fiscal year ending January 31st, 1968, we show a loss of $5,587 and nine cents.

In the third year, the fiscal year ended January 31st, 1969, it reflected a loss of $9,943.76.

Q And do you recall how the records were posted to those work sheets -- to the ledger cards?

Did they come from --

A The books of original entry, the cash receipts and cash disbursements were maintained by the bookkeeper.

And from those books of original entry we posted a general ledger.

Q And at that particular point did you make reconcilations to show that the books were in balance so to speak?

A Oh, yes.

Q And did you make certain sales tests and labor tests, etc., to see that the figures were normal within the industry or normal within -- for this particular concern?

A Those tests were basically done on a quarterly basis to make sure that our ratios were correct, our percentages did look like they were logical.

MR. SISKIN: I have no further questions of the witness at this time.

JUDGE ROSE: Cross examination.

MR. APPELL: At this time, Your Honor, I would like to see the tax returns and similar records for the years 1965 -- it would be the year ending 1-66, I guess, and the two years subsequent.

JUDGE ROSE: You are going to need sometime to study those, is that what you had in mind?

MR. APPELL: I would like a few minutes.

MR. SISKIN: Some of them are here now.
The '66 one is right here.

JUDGE ROSE: Well, we will be in recess for about five minutes.

(Recess taken.)

JUDGE ROSE: Back on the record.

MR. APPELL: Your Honor, I call for production of similar records for years in the period of '65 and '71.
I haven't gotten any.

MR. SISKIN: Your Honor, I have the purchases for '65 there.
You will undoubtedly get the earlier years if my accountant here can locate those records.
He brought those records '65, which contain the purchases and -- did you bring any other records?

THE WITNESS: No.
That's all I brought.

MR. SISKIN: Do you have the other records?

THE WITNESS: I will have to go back in our files to get the earlier years.

Q (By Mr. Appell) Mr. Knopp, I ask you to look at these records, and I ask you for the years ending 1-66, what were the purchases of raw materials?

A The purchases reflected in the ledger were 55,000 dollars.

Now, this is unadjusted, which means we don't have any accruals at the end of the year.

Q The figures that you gave for the other years, were they also unadjusted?

A The purchase figures?

Q Yes.

A The purchase figures were also unadjusted -- I had given you sales figures and I had given you unadjusted figures.

Q 25,000, 29,000, 28,000, those are also unadjusted?

A That is correct.

Q Can you give us the figures for each of these years for the other materials purchased?

A Start with the fiscal year 19 -- January 31st, 1966, we had baked goods 15,883.

Paper materials 4,037 dollars.

And dairy purchases 21,297.

For the fiscal year ended January 31st, 1967, baked goods 11,295.

Paper goods 2,933.

Purchases of dairy I will have to add up for you because we don't have a total on it.

Purchases of dairy were 71,023.

For the fiscal year ended January 31st, 1968, baked goods 9,589.

Paper materials, 18 hundred and 34 dollars.

Dairy department purchases 76,768.

Finally for the year ended January 31st, 1969, baked good, 9,496.

Paper materials, 15 hundred 95.

And dairy department, 107,558.

Q Now, baked goods, would that be part of the non bagel operations when you say baked goods?

A Baked goods are the purchase of already baked cookies and things of that nature.

Q That would be sold also in the store?

A Right.

But as part of the dairy rather than the bagel operation.

Q Right.

What would paper goods be?

A Bags, basically bags to --

Q Which could be used for anything?

A Anything, right.

Q You have no other tax returns with you or work sheets?

A No, not with me.

MR. APPELL: Your Honor, I renew my request for the records, which I have already stated previously, for all these companies.

JUDGE ROSE: You will furnish those records, were you not, Mr. Siskin?

MR. SISKIN: If we have them, we certainly will.
We reserve our rights to object to later years.
I don't know what relevance they have.

JUDGE ROSE: Very well.
Anything further, Mr. Appell?

Q (By Mr. Appell) Do you know what this company sold by way of dairy?

A I can go down the list of things.
We sold milk, juice, fish, locks, herring.

Q Salads?

A Salads, already prepared salads.

Q Do you know how long Tri-Boro was in that dairy business?

A If you let me take a look at the purchases I can tell you when we started purchasing diary materials.
The purchases of dairy started approximately August of 1966.

Q Do you have any interest in this store by the way?

A No.

Q Are you related to any of the principals?

A Not at all.

Q Do you have any records to reflect whether Tri-Boro's owners engaged in more baking, actual baking on their own in the years '67 and 1968, those calendar years?

A Actually the figures would be reflected on the tax returns as officers salaries.

It doesn't really reflect that -- what their occupation was at that time.

Q Did you have any records in your custody that would show whether they actually were engaging in more baking themselves, personal work?

A No, I don't.

MR. APPELL: I have no further questions, Your Honor.

JUDGE ROSE: Mr. Siskin?

MR. SISKIN: I have no further questions of the witness at this point.

Off the record.

I want to ask him whether he wants the accountant to come back?

JUDGE ROSE: Off the record.

(Discussion off the record.)

JUDGE ROSE: Back on the record.

I have a couple of questions.

Q (By Judge Rose) Will you go back over this ratio of sales to payroll?

A Yes.

You want me to repeat the figures?

Q Yes.

Right.

A Okay.

Starting with the year January 31st, 1967, our sales were $415,954, and our salaries and wages 65,696.

Q Is that -- does that include the owners -- compensation to the owners?

A No.

That was strictly production and sales.

Q When you are talking about salaries and wages. are you talking about people that baked the bagels?

A Baked the bagels and actually doing the selling of -- at the counter.

Q Selling at the counter?

A Yes.

Year ending January 31st, 1968, we had 228,642 in gross sales and 6,900 -- excuse me, 6,393 dollars.

In the production and the sales salaries.

And in the year ended January 31st, 1969, gross sales of 4 -- 278,491 and the salaries 6,661.

Q Repeat that again?

A January 31st, 1969, the sales were 2 hundred and 78419.

Salaries 6,661.

Q It looks offhand like in 1967 the salary and wages was much higher percentage of the gross sales?

A That's correct.

Q How do you account for that?

A Actually the mark up difference in the production of bagels differed quite considerably from the mark up on the dairy, which became our main part of the operation after 1967.

It was a completely different ratio.

Q That's reflected in the type of product that you're selling?

A Exactly.

In other words, it would be a different percentage when applying the wages to a production type item as to a selling type item.

Q Can you tell from that whether or not any of the owners of the business were engaging in production work, and this, therefore, affected the sales salary ratio?

A From these figures I don't think it's possible to tell that.

Their officers salaries are strictly listed separately, and from just the figures I couldn't tell -- the sales figures is not broken down as to the amount of bagel and dairy.

So without having an accurate break down of the sales figures it would really not give an accurate break down of the salary figure.

Q In any of those -- these documents you brought with you, is the sales figure broken down bagels as opposed to dairy?

A No.

The purchase figure would be, but not the sales figures.

JUDGE ROSE: That's all I have.

Q (By Mr. Siskin) With respect to the purchases of bagel material -- bagel producing materials, would you review that for us and show the correlation in terms of percentages?

A If you give me back my sh eets I will be happy to.

Q Sure.

(Handing.)

Q And will you tell us what the figures are as adjusted, the correlation as adjusted?

A Okay, fiscal calendar year ended January 31st, 1967, sales figure 415,954.

You want the purchase of the materials --

Q Purchase of materials that the bagel bakers would be w orking with?

A That figure would be 52 thousand 110 dollars.

Q Will you tell us what the labor cost was?

A The labor cost, okay.

119,406.

Q The labor cost for bagel bakers?

A 65,696.

Q Will you do the same thing for the for 1968 -- fiscal year ending 1-31-68 and 1-31-69?

JUDGE ROSE: Excuse me just a second.

You said the cost for baking bagels and he gave you an answer 65,696.

MR. SISKIN: That's the payroll factor.

JUDGE ROSE: Isn't that this whole payroll?

THE WITNESS: No.

That's just the production payroll -- let' s say it's the whole payroll excluding officers.

That's only the production payroll.

JUDGE ROSE: That would include the dairy sales too?

THE WITNESS: Oh, yes.

JUDGE ROSE: So it's more than just bagels?

MR. SISKIN: Yes.

To that extent that's correct.

But it does not include the officers.

A That's correct.

Okay, for the fiscal year ending January 31st, 1968, gross sales 228,642.

Purchases of raw materials 31,612 and the salaries 6,393 dollars.

Let me make a correction on that.

I gave you the wrong figure.

The sales figure was correct.

The purchase figure January 31st, 68, was 30,813 dollars.

And the labor figure was 6,393 dollars.

Q And where are you getting these figures from by the way?

A The tax return, which is -- I am checking at the same time against the work sheet to make sure the figure coincide.

Q Could you mark those figures with an asterisk, please, on the work sheets, the ones you have, just cited, in the adjusted column, correct.

A Correct.

The final year, January 31st, 1969, the sales figures 278,419.

The purchase of raw materials --

Q Is that baking raw materials used in production --

A Baking raw materials.

Q Solely in the production of bagels?

A That's right.

31,612 dollars.

Q And could you mark with an asterisk for all three years the pertinent figures you just cited?

A Those are the three.

MR. SISKIN: That's all, Your Honor.

No further questions.

MR. APPELL: Nothing further, Your Honor.

JUDGE ROSE: This is all very interesting.

I just hope somebody explains to me what it means.

MR. SISKIN: I hope we will be able do to that, Your Honor.

Based upon precendent, I hope so.

I have no further questions of this witness, Your Honor.

JUDGE ROSE: Let me ask you now, in 1967, you have a ratio of bagel salaries -- baking salary and wages to baking raw materials of 65, to 52,000 roughly, right?

THE WITNESS: Salaries to materials, yes.

JUDGE ROSE: Andthen in 1968 you have a ratio of baking -- of salaries and wages baking, raw materials of about 6,000 to 30,000?

THE WITNESS: Yes.

JUDGE ROSE: And it's essentially the same ratio in '69.

Now, how can you explain the difference as between the '67 return and the ratio of those -- of these two items, and the two subsequent years?

THE WITNESS: From these records, Your Honor, I really can't say at this point.

I have a figure broken down here of approximately the percentages to total sales which seem -- which is the figure that we do for our comparisons, and we have on the purchases of raw materials, approximately a 12 percent difference in to the later years, which seem to be -- because we actually were going out of the bagel type production business.

The increase in the purchases was approximately six percent of our -- in the purchase of our dairy products, which again reflects the fact that we had gone into this different type of business.

JUDGE ROSE: These figures we were discussing are just for bagel baking, the wages and salaries just for bagel baking and the raw materials just for the bakery?

THE WITNESS: The salaries are actually the bagel baking plus any sales help we might have.

JUDGE ROSE: Okay.

It appears to me that the salaries for wages and salaries for baking bagels is much lower than the -- it was in 1967?

There your ratio was something like -- something in excess of one to one, 65,000 against 52,000, where it was tramatically --

MR. SISKIN: I think I can elicit that, Your Honor, if you will permit me and continue upon my redirect.

Q (By Mr. Siskin: Mr. Knopp, there were drivers in the earlier years, weren't there?

A That's correct.

Q There were truck drivers that used to drop bagels off on the wholesale stops, were there not?

MR. APPELL: Your Honor, I am going to object to the leading.

JUDGE ROSE: Overruled.

A We have in -- year ending January 31st, 1967, we did have the routes and we did have the drivers, so their salaries would be reflected in the 52,000 dollars -- excuse me --

Q In the 65,696?

A That's correct.

Now, according to my work sheets in January of '68 we have drivers, no salaries.

We had no wholesale business.

Q That was true in '68.

Was that also true in '69, fiscal year ending 1-6 ?

A I believe so, that's correct.

JUDGE ROSE: Okay.

Anything gurther of this witness?

MR. SISKIN: Yes.

Q Looking at the baking supplies or baking raw materials for the three years, 1-31-67, and '68 and '69, I notice that there was a various -- a sharp variation between '67 and '68 and '69, first years from the last two.

Speaking of percentages, is it fair to say that the baking materials -- need for baking materials shrunk, based upon the figures you gave me, by 40 percent?

A I have the figures here.

I can give you an exact figure.

The figures -- first year 1967 we were talking of approximately 38 percent of our purchases were for raw materials.

Going into 1968 that figure dropped to approximately 25 percent of our total percent.

Q '69 -- last year '69 or '67?

A January 31st, 1969.

Q You said '67.

A I am sorry.

Q Now, speaking only of the purchases of raw material, bagel supplies so to speak, what was the percentage and drop from '67 to '68 and '69?

A It was very close to 50 percent.

We had gone from approximately 38 percent to approximately 20 percent.

Q And in your knowledge of accounting, would you attribute that solely to a decrease in the need for raw materials themselves?

A Absolutely.

Q And would it follow, from an accounting point and principle, that bagel baking labor being a varable cost would also fluctuate in the same percentage as this shrank?

A Yes.

MR. APPELL: Objection.

JUDGE ROSE: Overruled.

Q And does that follow inexorably as a matter of accounting principle?

A Absolutely.

JUDGE ROSE: Anything further.

Q (By Mr. Appell) Do you have any records that -- to show what the labor costs were for drivers alone?

A I would have to go into some further ledger cards to go back into the records to pull out the amount that were drivers.

That would only be for that first year, January 31st, 1967.

Q By the way, when you were given testimony, for instance, and said 1967, do you mean the year ending January '67?

A Yes.

I have been talking fiscal years.

MR. APPELL: Your Honor, I would like to have the records with respect to drivers?

MR. SISKIN: I have no objection.

JUDGE ROSE: Very well.

MR. APPELL: I have no further questions.

JUDGE ROSE: Anything further of this witness?

MR. SISKIN: No.

Just off the record.

JUDGE ROSE: Off the record.

(Discussion off the record.)

JUDGE ROSE: Back on the record.

We will be in recess now until 9:30 tomorrow morning.

(Whereupon, the record was closed at 4:45 o'clock P.M.)

PROCEEDINGS

JUDGE ROSE: On the record.

Proceed.

MR. SISKIN: The previous witness is coming on again, Mr. Knopp.

Whereupon,

HERBERT KNOPP

called as a witness, having been previously sworn, was examined and testified as follows:

CONTINUED DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Knopp, did you have a chance to review your financial data?

A Yes, I did.

Q Between the last time you testified, last night, and this morning?

A Yes, I did.

Q And will you tell us what error you made in extracting financial information from the figures?

A Right.

To my embarrassment, I find that I, when giving the figures for the bakers, which I believed to be the figures for the bakers' wages, I came up with a figure that was actually not representative of the bakers' wages.

It actually, the first year was the drivers and our bookkeeper and then the years after that, it was the bookkeeper's wages, where, actually, the bakers' wages appeared on the second page of the tax return, which I realized after I had testified.

Q And they appeared where they normally should appear, in the cost of goods sold, is that correct?

A That is correct.

Q Isn't it normal procedure for labor used in producing sales, as -- in the production area, to be treated as a cost of sales item, rather than an overhead item?

A Yes.

Q Where you were extracting labor costs from the worksheets, you -- yesterday, you were extracting labor costs in the overhead section, so to speak?

A Correct.

Q Rather than the --

A Costs of goods sold.

Q I'm sorry to do this, but will you please go back and re-establish the correct figures for the three categories?

A Okay.

Starting with the --

Q Will you asterisk or star the information both in the tax returns and in the financial data, so as to make clearly where you're getting -- make clear that you're getting the information from?

A Okay.

Do you want me to go back and state the sales?

Q Yes, for purposes of clarity.

A For January 31st, 1967, our sales were 415,954.

Our bakers' wages,$96, 370.00.

Q How about purchases, flour?

A I'll have to take a look at the worksheets for that.

Q Yes, I'd appreciate it for the purposes of continuity.

A The Exhibits from yesterday?

Q The Exhibits, yes.

A The flour purchases for that year totalled $52,110.00.

Q Please go to the next year?

A The fiscal year ending January 31st, 1968.

Total sales, 228,642.

Bakers' wages, 24,931.

MR. APPELL: What's that?

THE WITNESS: 24,931.

Q And the baking supplies?

A Yes.

$30,813.00.

Q And for the next fiscal year, 1/31/69?

A Fiscal year January 31st, 1969.

Total sales, $278,419.00.

Bakers' wages, $33,259.00.

Cost of raw materials, $31,612.00.

Q Now, in comparing these three years --

I'm sorry.

In comparing these three years, in order to make comparisons equivalent as between wages and sales, and as between any other factors, wouldn't you have to take into account the kind of sales that had been obtained, retail versus wholesale, et cetera?

A Yes, we would.

Q And will you tell us, did the nature, according to your knowledge, did the nature of the business of Tri-Boro Bagel change between the year 1966, '67 and '68, at any point in those years?

A Yes, it did.

Q In what manner did it change?

A We changed from a wholesale bagel distributor type of a business, to a grocery type of an operation, where most of our sales as brought out by our purchases, were in the dairy line, as opposed to the purchase of bagels.

Q Now, did you bring with you your financial data for other years?

A Yes, I brought at the request of counsel, the later years.

I believe three later years.

Q Did you bring with you the tax return for the earlier year?

A Yes.

I found one for January 31st, 1965, which I photographed and brought in.

Q These came from your files?

A Yes, they did.

Q Can you recall when the wholesale operation ceased?

A I can tell by looking through the purchase journal to see when our actual purchases of dairy material started.

Q Will you do that, please?

A Yes.

Our purchase of dairy materials began August, 1966. 1965.

Q And when did the wholesale operation end?

A The wholesale operation seems to have ended with the fiscal year ending January 31st, 1967.

Q Can you tell us, going back to correlations now, ratios, between labor, bakery supplies, and sales, is it still true that you, as an accountant, would, following your accounting principals, be able to extract certain ratios between sales, bakery wages and bakery supplies?

A Yes.

And would that be true as an accepted practice in the accounting profession?

A Yes, it would.

Q Will you tell us what conclusions you would draw as an accountant, by looking at the purchases and bakery wages?

A Okay.

I have taken an average, or a percentage of the bakers' wages to the total sales for the years 19 -- fiscal years January 31st, '67, 8 and 9, and the results were as follows:

The first year, January 31st, 1967, our percentage of bakers' wages was approximately 23%. The next year, January 31st, '68, it dropped down to approximately 11%. And in January elst, '69, approximately 12%.

Q Now, with respect to the conclusions that you would draw from the rough ratios between purchases, baking supplies, and payroll for bakers, would you say that it follows logically, and inescapably, that as --

MR. APPELL: Your Honor, I object to the form of the question, right now.

Why can't Counsel ask this gentleman a question?

JUDGE ROSE: That's right, sustained.

MR. APPELL: He's been doing it through the whole examination.

JUDGE ROSE: That's enough, Mr. Appell.

I sustained your objection.

Q Would you say that, with respect to purchases, bakery supplies, that you could form a conclusion as to how bakery payroll would fluctuate?

A The bakery purchases seem to have dropped in approximately the same proportion as the bakers' salaries, in comparison with the sales for the year, throughout the three years.

Q To your knowledge, was there any difference in the method of baking bagels, so that more or less flour would be consumed?

A Not to my knowledge, no.

Q Is it fair to say, then, that if the baking process continued, the same as it did for all the three years, that you could form a conclusion as to the need for labor during the years 1968 and 1969?

A The labor and the direct merchandise purchases are a direct cost, as oppose[illegible] a variable cost.

They would go up and down in the same relation as the sales.

So, it would be a definite trend, if the bagel production went down, our salaries would go down and our purchases of raw materials go down.

Excuse me, let me correct that.

JUDGE ROSE: Excuse me, I have to interrupt here.

I thought yesterday he said that the sales figures were total sales and not bagel sales.

MR. SISKIN: Okay.

I believe that's so, Your Honor.

JUDGE ROSE: The record is now confused, because you're talking about bakers' wages only, flour purchases only, as against sales, and you don't know how much of those sales are bagel sales.

MR. SISKIN: Correct, Your Honor.

But what I'm attempting to elicit from the witness, Your Honor, is strictly the ratio between purchases on -- of bakery supplies, and the payroll for bakery labor.

That's the correlation.

JUDGE ROSE: You were discussing sales, though.

MR. SISKIN: Yes, because that would be a considered ratio, Your Honor.

But the figures that I'm trying to elicit here, are strictly the ratio between purchases and wages.

I'm not slanting my remarks to sales at all, in recognition of that factor, Your Honor.

All I want now to establish from the witness is the correlation between bakery purchases and bakery payroll.

And the questions have been directed in that vein.

JUDGE ROSE: Okay, go ahead.

Q (By Mr. Siskin) Mr. Knopp, as direct costs, they would be the cost factors that would form the so-called prime costs, would they not, in production of the bagels?

A That is correct.

The direct labor and the direct materials.

MR. SISKIN: I have no further questions of the witness at this point.

MR. APPELL: Your Honor, I should like a couple of minutes to examine these returns that have been provided today.

MR. SISKIN: In the future, Your Honor, I will give those prior to the proceedings beginning.

JUDGE ROSE: I would certainly hope so.

Off the record.

(Discussion off the record.)

JUDGE ROSE: On the record.

CROSS EXAMINATION

Q (By Mr. Appell) Mr. Knopp, do you have any records to show what bagel sales were in these years you testified to?

A No.

All our sales are actually combined as one figure.

Q Do you have any records to show whether dairy sales went up or down from the beginning of that operation?

A The only thing I could tell you is that, based on our purchases, the dairy sales have multiplied quite considerably, assume the same market through the years, we have quite a bit more in dairy sales, than we did in previous years, based on our purchases.

Q To your knowledge, did the principals of Tri-Boro Bagels, consciously plan to increase dairy sales and expand that operation, through the years?

A Well, I'm not really a part of, you know, the thinking of the projection of the type of a business they would go into.

I was aware of the fact that the dairy sales did increase, though.

In the actual planning, I was not actually involved.

Q So, you would have no idea if Tri-Boro officers decided to expand the dairy at the expense of bagels, feeling that that was a more profitable line?

A I have no idea.

MR. SISKIN: Objection.

I don't know where we're going to this.

It's irrelevant as to the motive for it, beyond just what happened.

JUDGE ROSE: Overruled.

Q (By Mr. Appell) Now, is it your testimony that the wholesale bagel operations, basically ended in January of '67?

A Yes.

At that point, we had no more labor for drivers, we had no more distribution of the bagels, other than over the counter.

Q Do you know why there was no more drivers?

A Do I know why there were no more drivers?

Q Yes.

A Now I seem to know why now, but at that time, I didn't really know.

Q Would it be fair to state that the wholesale was ended because the bagel bakers and the drivers were not at work?

MR. SISKIN: Objection.

The witness already testified he wouldn't know that.

JUDGE ROSE: If he knows.

Overruled.

A I couldn't really say.

MR. APPELL: I have no further questions, Your Honor.

REDIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Knopp, as an accountant, wouldn't it be possible for you to reconstruct approximately the dairy sales based upon a normal mark-up?

A Yes, it would.

Q Okay.

Wouldn't that process involve the conventional process of taking your purchases, computing or utilizing an average G. P., gross profit percentage, and then coming up with the sales, approximately, the sales based upon the -- the gross profit or cost of goods sold factor?

A Yes, it would.

MR. APPELL: Objection to the form of the question.

JUDGE ROSE: Why?

MR. APPELL: Let him ask the witness what his method would be.

He's testifying.

JUDGE ROSE: I think that's appropriate.

Mr. Siskin, just ask him how he does it.

Q (By Mr. Siskin) Can you explain to us how you would compute approximate sales of dairies for the respective years, based upon your purchases?

A We'd take the purchase figure. We would assume a gross profit percentage, based on the purchases, add that on to the purchases, and come up with an approximate sales figure.

Q And do you --

What gross profit figure would you utilize, based upon your knowledge of the industry?

A I think we're talking of somewhere between 25 and 30%.

Q Utilizing that range, can you go through the computation of what dairy sales or grocery sales for the years, fiscal years ending January 31st, '67, January 31st, '68 and January 31st, '69?

A Okay.

Q And when you recite the figures that you are utilizing, will you set in the record where you obtained those figures?

JUDGE ROSE: In the future, Mr. Siskin, --

MR. SISKIN: I understand, Your Honor.

JUDGE ROSE: Number one, you're going into a line that was not covered on cross examination. You're going into a new, different line of inquiry.

I'd appreciate it if, on your direct examination, you'd cover all subjects you intend to with the witnesses.

Secondly, in the future, I'd appreciate it if you'd have your calculations all ready, and your witnesses prepared to testify, so we don't have to waste time during the hearing.

MR. SISKIN: Yes, Your Honor.

I'm going to attempt, wherever possible, to have formal exhibits made.

THE WITNESS: I'm ready.

Q For the fiscal year ending January 31st, 1967, what would the dairy sales be, and tell us how you got the figure?

A The dairy purchases were approximately $52,110.00.

Adding on a mark-up of approximately 28%, which would be 14,590, I came up with an approximate figure of $66,700.00 of dairy sales.

This is assuming that our inventories are constant at the beginning and the end.

Q That would be roughly true, wouldn't it?

A Yes.

MR. APPELL: Objection.

JUDGE ROSE: Sustained.

Q Do you know whether the inventories were constant?

A The inventory for the year 1967, beginning and ending, was approximately $12 hundred difference, which is fairly accurately the same.

Q Now, if you thus took the dairy sales of 66,700, off of the $415,954.00 of total sales, what would your bakery sales be?

A 349,254.

Q Will you go through the same procedure for fiscal year ending January 31st, 1968?

A Dairy purchases, 78,090. Adding on a mark-up of 28%, 21 -- the mark-up would be 21,865. Giving us total sales approximately 99,955.

The inventories, again, in 1968, were approximately equal, beginning and end of the year. Subtracting that from our total sales of 228,642, it's approximately 128,687 would be the bagel sales.

Q And will you do the same thing for the fiscal year ending January 31st, 1969?

1969, our purchases of dairy materials, 108,824. 28% mark-up, was 30,470. Giving us total sales of dairy, 139,294.

Our inventory figures, that particular year, were almost on the button, beginning and end. Subtracting that figure from our sales figure, gave us 139,125 as our bagel sales.

Q Now, using those approximate figures for the three fiscal years of 349,000 bakery sales for the fiscal year ending '67, 128,000 for the fiscal year ending '68, January 31st, '68, and 139,000 for the fiscal year ending January 31st, '69, could you express in rough percentages the percentage decrease in sales of bakery items -- bagel items for those three years?

A Using the 1967 year as a base year, 1968 represented sales of 36.8% of the base year.

1969, 39.8% of the base year bagel sales.

Q When you said, '67, you meant the fiscal year ending January 31st, '67?

A Correct.

Q Or, in effect, the '66 year?

A That's right.

Q Expressed as a percentage of decrease, how much did sales decrease percentagewise, from '68, and contracted to '67, for the fiscal year ending '69, contrasted to the fiscal year ending January 31st, '67?

A The fiscal year ended January 31st, 1968, reflected a 63% drop over the fiscal year January, '67.

Q How about the '69 fiscal -- fiscal year ending January 31st, '69?

A That reflected a 60.2% drop.

Q Now, will you now express percentage of sales represented by the bakery wages, and that would be for each fiscal year, fiscal year ending January 31st, '67?

A You want me to compare --

Q I want you to compare bakery wages to the bagel sales.

A Okay.

For the fiscal year ended January 31st, '67, the bakers' labor payroll, in comparison to the sale of bagels, was 27.6.

Fiscal year end January 31st, '1968, was 19.4.

And the fiscal year ended January 31st, '69, 23.9.

Q Now, do you happen to know the difference between -- whether there was a difference between a wholesale mark-up in bagels and the retail mark-up in bagels?

A I really don't know.

Q These figures do not include the fringe costs, do they?

A No.

Q Payroll taxes?

A This is strictly salary. Strictly salary.

Q Is it fair to say that the direct labor percentages are standard ratios that are used in business?

A From year to year they change, but I would say that from establishment to establishment, they're fairly accurately pretty close together.

Q Is it also fair to say that that represents a fair barometer of computing what direct labor costs would be on -- on projected sales?

A That's correct.

Q Within the range of the percentages that we've expressed.

A Right, right.

Q And is it also fair to say that these direct labor percentages and the percentages of labor to bakery purchases, are standard comparative checks to see if your operating ratios are within the norms?

A Yes, they would be.

Q And would it be fair to say that either one of these would be a -- a method that would be used normally by accountants to test operating performance?

A Exactly.

Q Or both of them, would that be true?

A Normally, both would be used.

MR. SISKIN: I have no further questions of the witness.

RECROSS EXAMINATION

Q (By Mr. Appell) Mr. Knopp, when you give these percentages, for sales, are those bagel bakers' wages?

A The last percentages I just gave you?

Q Yes.

A Yes.

That was breaking out the bagel bakers' salaries, as opposed to the bagel sales, which we just developed.

Q May I see the records for the wages that you used?

A Sure.

The 1967, 96,378.

The bagel bakers sale of 96,370 --

Q On the income tax return?

A Yes.

Q That's only bakers, it's not other wages?

A No.

The other wages would be reflected on the front.

MR. APPELL: I have no further questions.

FURTHER REDIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Knopp, would you indicate where you obtained the bagel bakers' wages from the tax return?

What portion of the tax return?

A That was from the cost of goods sold, section of the tax return.

Q Is that where it's normally placed?

A That's where your prome costs, prime labor and direct costs would appear on the tax returns.

Q That was uniformly true for each year, is that correct?

A Yes.

MR. SISKIN: Mark this for identification, United States Corporation Income Tax Return, fiscal year ending 19 -- January 31st, 1965.

JUDGE ROSE: Are you going into another line of inquiry now, Mr. Siskin?

MR. SISKIN: No.

The question was broached, I believe by Mr. Appell, on --

JUDGE ROSE: He was just asking him to explain what the figures were.

MR. SISKIN: All right.

I'll withdraw this Exhibit.

As long as it's not being testified to on cross examination.

I have no further questions.

MR. APPELL: I have one, Your Honor.

JUDGE ROSE: Okay.

FURTHER RECROSS EXAMINATION

Q (By Mr. Appell) Were these worksheets that were in evidence, used to produce the tax returns?

A Yes, they were.

Q But isn't it a fact that on these work sheets, it just said, bakers and other wages, and didn't have bakers broken down?

A Let me just check.

I have them here.

Bakers and others, simply meant, bakers and kettlemen, as opposed to somebody else out of the baking line.

We had our drivers broken down, our sales, our office broken down, our office broken down.

Bakers and others, simply meant the actual man who puts the bagels in the oven and the fellow who stirs in the kettle.

MR. APPELL: No further questions.

JUDGE ROSE: I have a question.

I thought he testified yesterday that this wages, bakers' wages figure included truck drivers for the fiscal year 1966?

THE WITNESS: Yes.

That's actually the discrepancy that I realized on the way home, which I'm retestifying to correct that.

JUDGE ROSE: It does not include truck drivers?

THE WITNESS: No.

What I had said yesterday was my error.

These are the correct figures today.

JUDGE ROSE: Do you expect then a ratio of wages to sales to be a constant factor?

To be a constant thing?

Or not?

THE WITNESS: Based on the bagel sales, it normally would be a constant factor.

Based on dairy sales, it would not really be considered a constant factor, because it's not a prime cost.

We don't actually put in a certain amount of labor hours to produce the dairy products, where we do on the bagels.

JUDGE ROSE: No, no, I'm just talking about the figures you gave, you have bakers' wages, which are just the people who bake the bagels?

THE WITNESS: Correct.

JUDGE ROSE: And then you have the purchases of baking material, flour and other things?

THE WITNESS: Right.

JUDGE ROSE: Now, that ratio, flour over wages, ought to be constant, is that correct?

THE WITNESS: It should be within reason.

To be a variable cost, when one would go up, the other woul go up, and vice versa.

JUDGE ROSE: Follow with me, then, looking at January 31st, 1967, you have flour purchases of 52,000 plus.

THE WITNESS: Right.

JUDGE ROSE: And wages of 96,000 plus, which is a percentage of 54%.

In other words, the flour purchases are 54% of the wages, right?

THE WITNESS: Approximately, right.

JUDGE ROSE: Okay.

Now, in 1968, you have flour purchases, material purchases of 30,000, wages of 24,000, and that ratio then becomes 125%.

THE WITNESS: Purchases of 30.8, and wages 24.9.

That's true, sir.

JUDGE ROSE: And then, in 1969, purchases of 31,000, against wages of 33,000, which is a percentage of about 93.

THE WITNESS: 31,000 as opposed to 33, 259, that's correct. That's correct, sir.

JUDGE ROSE: Can you explain what appears to me to be a rather substantial variation in these percentages?

THE WITNESS: To be very honest, at this point, I don't see -- we could have possibly had one or -- one of the officers possibly baking some of the bagels, and his wage, of course, wouldn't have been shown in the bakers' salary.

It would have been shown in the officers' salary portion, which would change the percentage.

JUDGE ROSE: Right.

That was the question I was going to ask you.

It seems to me that in order to give this ratio for 1968 and 1969, in the same general range as that ratio for 1967, one way to do it, at least, would be to increase the wages, is that right?

THE WITNESS: That's correct.

JUDGE ROSE: And one way to increase the wages would be to have, for instance, somebody doing the labor, whose wages were not reflected in your returns.

Is that right?

THE WITNESS: That's correct.

JUDGE ROSE: For instance, an officer.

THE WITNESS: That's correct.

JUDGE ROSE: Can you think of any other explanation for this variation in percentages?

THE WITNESS: No.

It's just that the year ending January 31st, '67, of course, would take in most of the year of 1966.

JUDGE ROSE: Right.

THE WITNESS: And the people working at that time were working at a much higher rate, than some of the people who we had coming in later, who were actually working for --

JUDGE ROSE: Working for less wages?

THE WITNESS: Yes.

In other words, it doesn't necessarily mean that the hours were less because the dollars were less.

JUDGE ROSE: Okay.

So, you could explain this by one factor, that is that the wages -- the wage rate per hundred boxes of bagels was somewhat less?

THE WITNESS: Yes.

JUDGE ROSE: And another explanation would be that officers in the corporation, whose take out was reflected someplace else, were doing some of the baking?

THE WITNESS: That's true.

JUDGE ROSE: Okay, thank you.

Mr. Siskin, anything further of this witness?

MR. SISKIN: Yes.

FURTHER REDIRECT EXAMINATION

Q (By Mr. Siskin) Judging -- Getting away from one method, which, of course, is the labor to purchases, comparable ration, the 27, the 19, and the 23, though, percentages that you have testified to, those percentages are well within the norms in the industry, are they not?

MR. APPELL: Objection.

JUDGE ROSE: Sustained.

Q Do you know when you --

Did you check these percentages as against the sales for the three years?

A At the time these percentages did coincide with the normal per the industry.

I'm more familiar at this time with the percentages that we have nowadays, than going back to see what we had over ten years ago.

Q Isn't it fair to say, one of the other variants in the ratios, would be the cost of flour?

MR. APPELL: Objection.

JUDGE ROSE: Mr. Siskin, don't lead the witness. Just ask him.

Q Will you tell us what other elements could come into adjustments of the percentages?

A The whole inflationary trend of the -- of not only the flour, but of all the malt and all the other type items that go into the production of the bagel.

Q That would affect the ratio -- in what manner would that affect the ratio?

A The cost of the goods sold actually would have gone up, and it's been very difficult to raise the price of the actual sales price.

Therefore, our cost percentage could possibly or could conceivably go up, where we're not using any more materials, but we're simply putting in the same materials at a higher price.

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Now, will you look through your figures for the three years, and give us what the cost of goods sold would be for the bagel sales, expressed as a combined percentage?

Expressed as a percentage of bakery purchases and labor?

MR. APPELL: Your Honor, I believe we're going far beyond the scope of any round of examination.

MR. SISKIN: Your Honor, this was the examination. I'm just getting a consolidated rate.

JUDGE ROSE: I think we've been over this before. How many times do we have to go over it, Mr. Siskin?

MR. SISKIN: Well, it would be helpful, I think, for us to get a consolidated cost of goods sold, Your Honor, for both of those items, labor and bakery supplies, whereas, without that figure, you would conceivably have to take into account other factors.

Both, together, would make up a consolidated factor, which is the normal factor, I submit, in determining cost of goods sold.

They don't just consider labor and they don't just consider materials, they merge them both.

We were trying to arrive at --

JUDGE ROSE: Okay, let's not argue too much about it. You're getting into the area of argument.

All these figures are in evidence.

Go ahead, but be brief, please.

MR. SISKIN: Okay.

Q (By Mr. Siskin) Could you briefly tell us what the gross profit would be, taking into, percentagewise, taking into account direct labor and purchases, baking supplies?

A Unfortunately, I couldn't break that down for the reason we have an inventory that's a combined figure, and I just don't know which is the flour and how much is the dairy.

Q I see.

MR. SISKIN: No further questions.

JUDGE ROSE: Anything further of this witness?

FURTHER RECROSS EXAMINATION

Q (By Mr. Appell) The price raises with respect to flour purchases, when would they have occurred?

A They've been constant for years.

Every year, every month, you'll have increases in the bags of flour, in the malt. All the ingredients. From week to week.

Q Would that be true in '66 and '67, also?

A As far as I know, it's been all the way through.

Used to pay $6.00 a bag of flour.

You're now paying close to $15.00 a bag of flour.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Cohen, what is your title with Tri-Boro Bagels?

A President.

Q How long have you been President?

A Sixteen years.

Q How long have you been engaged in the bagel industry, as a bagel company?

A Since August, 1945.

Q And were you engaged from that time continuously, as an Employer?

A Yes.

Q Did there come a time when the nature of your business shifted from one form to another?

A Yes.

Q Can you tell us some of the facts leading up to that switch, and the nature of the switch?

A Well, at one time, we were strictly a wholesale business, where we devoted our entire efforts to the wholesale end of the business. And we didn't rely at all upon the retail.

But, eventually, there were some -- some other factors entered into the picture, and we were forced to look for other sources of income, such as expanding our business into trying to get a little bit of the retail business to help offset our tremendous costs of the wholesale operation.

Q Can you fix this point in time, and try, to the best of your recollection, to state on the record when these changed occurred?

A Well, I would say when I moved out of the Bronx, which was approximately 16 years ago, we moved into that type of an operation, to try to expand both operations, the wholesale, as well as the retail.

Because the Bronx, at that time, was becoming a decaying borough, and at that time, I had operated by myself, and I wasn't a corporation at that time, and we had had a meeting with other people.

That is, I had a meeting with other people that were in the business, and I suggested to them that we combine our efforts and form a corporation, so that possibly we could exist, because of what was happening in the Bronx as well as Brooklyn and Manhattan.

And from that, we formulated a plan to form the Tri-Boro Bagel Company, and we thereupon opened up in the Borough of Queens, under the name of Tri-Boro Bagel Company.

Q Did there come a time when your wholesale business [illegible] to cease or become reduced substantially?

A Yes.

Q Can you fix that point in time?

A I would say that point in time would be about sometime during the beginning of 1966.

Q And can you tell us what steps you began taking to offset that decrease?

A Well, could I elaborate on that?

Q Yes.

A The first thing that did happen in the industry is, there was a fellow up in Buffalo, by the name of Able's Bagels, that started sending frozen bagels into the New York market.

Then there was another fellow up in New Haven, by the name of Lenders, that followed the same route, but on a much greater scale, also with frozen bagels.

And a short while after that, the worse thing of all happened, two people opened up a tremendous operation under the name of W & S Bagels, and this was a complete machine operation, and they -- and they started packaging bagels and selling them fresh, rather than frozen.

This is what really -- This is what really killed us.

Q All right.

Is that W & S, Throgs Neck Bagels?

A Yes. That's where they had their plant.

Q Can you fix that point in time?

A Well, I would say that would be about the beginning of 1966, sometime around there.

Q And will you tell us what steps you took to combat the influence of the frozen bagels and the mass produced bagels?

A Well, my business started to drop at the wholesale level tremendously, and at one of our meetings that we had, I suggested to our -- to our committee that we have a meeting with the Union and see whether or not we couldn't formulate a plan to try to survive, between the -- between ourselves, and the Union.

Because we, as Employers, saw the industry going down the drain, with this tremendous competition.

Q When you say, the industry, you meant the handcraft industry?

A The handcraft segment of the industry, which was surviving for at least 50 years that I know of, in New York City and New Jersey.

We had this meeting, I recall it was in the summer, I think it was 1966, and present at that time was a committee from the Union, and there was Harold Laskowitz for the Union, Ralph Bryer, Larry Horowitz, who was the President of the Union, and about three or four other officials.

And I happened to be down there, Mr. Glass was there and Manny Kalkstein, and we discussed the entire problem with them, and what was happening, that we were losing one large chain after another, because of this W & S, and the frozen bagels.

We had come up with a plan to them, and we suggested to them that they consider our plan thoroughly, because I thought it might be a feasible way to be able to combat all this competition, and try to survive as an industry, even though it was a small industry.

And the Union listened to it very thoroughly, and they agreed with what we had to say as far as the plan was concerned, and they said that they would let us know the following week how we were going to proceed with the plan. And I don't know whether they took it up at there Executive Board or not, but anyway, they told us that we would hear from them within the week.

They got in tough with Mr. Glass, and they said that they couldn't go along with it, because they couldn't expect their men to work for a little less, and the whole idea was dropped.

Of course, from that time on it kept sinking and sinking, and we had no way to combat these frozen bagels, as well as the W & S Bagels, because we were operating with such tremendous overhead, and this is what happened. Just couldn't compete with them.

Q Do you recall in what manner were these frozen bagels competitive with your own, as to cost?

Can you give us -- as to cost to the wholsale accounts?

A Well, I don't remember the exact price that we were charging, but we were selling, -- at that time, we were selling, I believe, our bagels, I think we were getting in the neighborhood of 60 or 65¢ a package for them, I'm not sure.

I'm not positive of that. And they were selling them for about 30 or 35¢ a package. Because we also had a packaging machine in our place, where we were packaging the bagels, and we were selling them to the Food Fair chains and Waldbaum's chains, and about four or five others. Grand Union chains. And we just couldn't compete with them, especially with W & S, who had his bagels right alongside of ours.

And eventually, the buyers from all these chains discontinued us. They said, why should a woman come in and buy your package, when she can buy his package for 30¢ less, and I couldn't compete.

Q Will you tell us the names of the chains that you lost, and when you lost them?

A Well, first we lost the Waldbaum chain. We were serving about seven or eight of them.

Then we lost the Grand Union chain, which we were serving about fifteen of their stores, in and around Queens and Long Island.

We had the entire Food Fair chain that we were

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which I believe was about 36 stops, which was the backbone of our route, and we lost them.

That was the last tremendous chain that we lost.

Q Can you tell us approximately when that occurred?

A The exact date, I couldn't tell you. But this was right after -- it had to be in the fall -- in the fall of '66 or '67, because we were -- this was right after we had the meeting with the Union, because I recall it very vividly, when we had this meeting.

It had to be right after then, because we were telling them they had to work with us, and they wouldn't just do a thing.

Q Was that before the lockout?

A Yes.

Q And did you ever see the W & S plant?

A I was never there. But I did see it when it was taken over by someone else. I went there.

Q Now, --

A When it was taken over by Bagels U. S. A., I saw the plant, I saw the operation.

Q Now, did you talk -- did you talk to the buyers of the chains?

A I absolutely did.

Q Is that where you --

Is that one of the ways you found out what your competition was underselling you at?

A Yes.

Q Was that the difference in prices throughout that time, approximately, 65 to 35, in that range?

A Yes.

Q What's that, per dozen?

A Per dozen, yes.

Q When did you step out of the wholesale business altogether?

Wholesale bagel business.

A Well, when we shut down at the time that we shut down, when we had the strike, naturally we had no way of producing the bagels, and we tried to do as best as we knew how, between my partner and myself. That was one of my partners who was deceased now.

He came from a bagel family, and he knew how to make bagels, and he taught me how to make them, and the two of us did as best as we could to try to survive.

We made whatever we could and sold them over the counter, to be able to feed our families.

Q But about when did you lost the last major wholesale chain?

Was it prior to the lockout?

A Yes.

Q Can you fix a point in time?

A I believe I still have the records.

I can get the exact time for you.

Q Now, did you shift the nature of what you were selling in the store at any point in time?

A Well, roughly, about 1965, I would say, we had a lot of requests from people for milk, and we had the room for it, so I got a milk case from the milk company, and we had taken in milk, and some cream cheese, which we were selling together with the bagels.

Q Now, can you tell us, did that trend towards dairy increase or decrease?

A It increased as we went along.

Q Can you tell us how many hours a day you kept open in the year 1966?

A Well, we opened at six o'clock in the morning, and we don't close until one.

That's -- I have to have a pensil.

Can I borrow a pencil, please?

Q No.

I'll withdraw the question.

Can you tell us whether the hours --

A Excuse me.

We're closed about thirty hours a week.

Q You're closed about thirty hours a week?

A Thirty hours a week.

Q Was that true from 1966 on?

A Yes.

Q At all the time?

A Right.

Q So, the time your store was open, was comparable these three years, '66 and '67?

A Yes.

Q And '68, was it not?

A Right.

Q Were you open seven days a week?

A Yes.

Q And that's true for '66, '67 and '68?

A Up to this very day.

Q Where is your store located?

A 183rd Street and Horace Harding Boulevard, in Fresh Meadows, Queens.

Q Would you say that's right off a major expressway?

A Yes.

Q What expressway is that?

A Long Island Expressway.

Q Is your store lit up at night?

A Yes.

The only store in that area?

Yes, of that nature.

Up until a year ago, it was.

be said to provide them.

We've already alluded to the journals and the records in evidence.

HEARING OFFICER: Mr. Siskin, produce the records or an Affidavit that they've been destroyed.

MR. SISKIN: Fair enough, Your Honor.

For the record, --

JUDGE ROSE: Is there anything more of this witness?

MR. APPELL: Yes, Your Honor.

Q (By Mr. Appell) Mr. Cohen, when did you start going into retail operation?

A Sixteen years ago.

Q What is the basis for your statement that around 1966, wholesale dropped?

Do you have independent recall of that, or have you looked at records?

A I mentioned when I said that Able's Bagels had invaded the field, and to follow him, Lenders Bagels, with frozen bagels, and on top of that, W & S came into the field.

Q How do you know that was 1966?

A How do I know?

Because the market was flooded with them.

It was flooded with them prior to that, and then when W & S came into the picture, that really killed the entire operation completely, because they were putting out a bagel in a package which wasn't frozen.

Q When did Able's start flooding the market with frozen bagels?

A Able's possibly even before 1965.

Q '65, '63?

A Might have been even before that.

Q How about Lenders, the same thing?

A Lenders has been in longer than that.

Q 1950's?

A I would say, Lenders is in business from the fifties on.

Q So, there was nothing new about Able's and Lenders, let's say, in 1966?

A No.

Just that one thing happened.

Lenders started to advertise on the subways, he started to advertise on the radio in New York City.

Q When was that?

A That was in 1966, '67, '68.

Q How do you know it was those years and not earlier?

A Pardon?

Q How do you know it was those years and not earlier that he started advertising?

A How do I know?

Q Yes.

A Because I heard it on the radio, and I hadn't heard it prior to that, and I had people that came in to tell me that they saw his ads on the subways.

Q How do you remember that it was 1966?

A What do you mean, how do I know?

A How do you remember the year 1966 as the year that that advertisement started?

A I said they started around that time to advertise.

Because, at that time, when W & S came in, he also heard Lenders in the picture, because with those wholesale bagels that he was selling at 35¢ a package, that weren't frozen.

So, he started to advertise at that time, because he also was hurt.

Q Did you see those advertisements, personally?

A I did.

If you want those in evidence, I'll try to get them from the subway company for you.

Q Now, when did W & S come into being?

A W & S followed -- W & S, I would say, come in around 19 -- the beginning of 1966, I would say.

Q And when did you perceive that W & S was huring your business?

A As soon as they started their marketing practices.

Q Early, '66?

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A That's right.

Q How do you know that it was W & S that hurt your business?

A How do I know?

When I started losing --

Q Or is this just something you assumed?

A It's not that I assumed it.

When I started to lose all those chains, and I saw that W & S product was there, that's how I knew I was losing it to them.

Q You, personally, saw W & S Bagels in the chains?

A I did.

Q In what stores did you see W & S Bagels?

A I saw them in the Waldbaum's, I saw them in Food Fair, I saw them in Grand Union.

Q How do you know they were W & S?

A I just got through telling you, that his bagels were packaged fresh with his label on it.

Q You saw the label?

A It's quite obvious.

Q Now, how do you know the price of W & S Bagels?

A The buyers from the chains had told me the price that they were paying for it.

Q Now, is it fair to state that you ended your wholesale operation completely at about the end of January or beginning of February, 1967?

A At the time, I would say so.

Q When you referred to a strike before, you were referring to what the Board found was a lockout, is that correct?

A That's correct.

Q And then you and your partner began making bagels, right?

A Yes.

Q Then did you continue to make bagels throughout '67, personally?

A Well, we had to survive.

Q Just answer, yes or no?

A Yes.

Q In 1968, did you continue to make bagels throughout the year?

A No.

Q When did you stop?

A Well, we had taken the Union back.

Q Then you stopped making them?

A We completely stopped.

Q How about your partner?

A He stopped, too.

Q Did you have any other employees who were not members of the Union, in 1968?

In '68.

A I believe we had a meeting with two of them, yes.

Q And what was the substance of the meeting?

A Well, we discussed the very same problem.

I was very much concerned why they didn't send the people, and they bluntly told me that the men -- that the men refused to come to work, I didn't have enough work for them.

Q Who was present at that meeting?

A Harold Laskowitz, I think Morris Amster.

I don't recall who else was there.

Q And were there any other subjects covered in this meeting besides that?

A No.

We were just concerned about straightening the matter out.

MR. SISKIN: I have no further questions of the witness, Your Honor.

MR. APPELL: No further questions, Your Honor.

JUDGE ROSE: I have a couple.

Mr. Cohen, these machine bagels, are they still in the supermarkets in New York?

THE WITNESS: Yes.

JUDGE ROSE: Other companies, not W & S, is that it?

THE WITNESS: It's not W & S.

They're Lenders.

JUDGE ROSE: They're Lenders?

THE WITNESS: They're frozen.

They're in all the frozen showcases.

It seems that Lenders purchased, only recently, they purchased Able's Bakers, they purchased their operation, and they combined it all under one roof. Because they had just built a new plant up in Connecticut.

JUDGE ROSE: Do you have any way of knowing, either now or back in 1966, what percentage of the bagels consumed in New York City, are those that go through the supermarkets, as opposed to the bakery shops?

THE WITNESS: Well, you might be able to find that information.

There's a fellow that represented the Thompson Machine Company, at that time, and they leased the Thompson machines on a royalty basis.

And this fellow, I think his name is Goodman, is that his name?

A VOICE: Gadman.

Who represented him?

THE WITNESS: Yes.

A VOICE: Gadman.

THE WITNESS: Gadman.

He represented them at that time.

They were a California concern, that manufactured the Thompson machine.

At that time, they were the only one that had a bagel machine that was functioning.

They had it on a royalty basis.

He would have a very good idea, because he used to collect from them. And this Ronnie Gadman, today, he's Vice-President of the Kaufman Machine Company, that manufactures the bagel machine.

They're out in Farmingdale.

It might be possible to get him in and possibly question him.

JUDGE ROSE: Okay, very good.

How about --

Answer me this.

I noticed that these little delacatessens around town sell bagels.

Where do they get their bagels?

THE WITNESS: As I said, there still are three or four shops that are still delivering bagels into Greater New York. A few of them that I know of.

One of them is -- There's only one that I know that still delivers a handmade bagel, that's the one on 185th Street and Union Turnpike, that delivers a handmade bagel.

There's one up on Broadway and about 195th Street that manufactures a machine made bagel that delivers them to the stores.

So, there are two or three that still deliver to the small stores, and the rest, they get through jobbers.

A jobber is considered a person that will get a bulk delivery, and he will give it to his people to deliver to these individual, small stores, where it doesn't pay, if you have a big operation, to serve a half a dozen or a dozen to a little delecatessen.

JUDGE ROSE: All right.

THE WITNESS: That's how that's done.

JUDGE ROSE: You testified that in 1966, the market was, in your words, flooded with frozen and machine made bagels.

Now, can you tell me what you mean by that?

How many bagels were coming in?

THE WITNESS: Well, Lenders, at that time, had a tremendous --

MR. SISKIN: Speak louder, Mr. Cohen.

THE WITNESS: Lenders, at that time, had a tremendous advertising campaign going. They were advertising, I recall seeing their rates on the subways and the radios to buy frozen bagels. They were selling them for about 60¢ a dozen less than what we were getting them for.

We felt it was a good advertisement for us, just because they were mentioning the name bagels, so we didn't object to it, at that time.

And Able's, at that time, was still in business on a very big scale, and W & S was the only one that was sending in a package similar to what we were packaging.

We had purchased a machine in Philadelphia, for packaging fresh bagels, where we were delivering every day to the stores, and it didn't require freezing them.

W & S was doing the same thing, except he was manufacturing machine made bagels, where ours were handmade.

We were packaging them in the machine, and they were selling them at Food Fair over the counter.

When he came in, W & S came in, he took the space we had, and so we were out.

JUDGE ROSE: Food Fair, for instance, in one of their typical stores, how many packages of bagels would he put into the store?

THE WITNESS: Let me give you an idea.

Food Fair was our biggest customer. We served thirty-odd stores of theirs. The entire chain on Long Island. We did over $300,000.00 a week with the one chain.

JUDGE ROSE: $300,000.00.

How does that break out into bagels?

THE WITNESS: I would say that it was at least 6, 7 thousand dozen a week, at that time.

JUDGE ROSE: That was in --

THE WITNESS: Just the one chain.

JUDGE ROSE: The one chain before you lost it?

THE WITNESS: Yes.

JUDGE ROSE: So, that would be sometime in 1966 or '65?

THE WITNESS: Yes.

That would be in the latter part of '66. When we had the meeting with the Union, and I tried to convince them that they should work with us and try to resolve the problem.

JUDGE ROSE: Now, --

THE WITNESS: As a matter of fact, there's something else I didn't mention, Your Honor.

We were so anxious to maintain the wholesale business, like a jerk, I have to say it about myself, I was going to Philadelphia by truck to pick up bagels and to deliver them to the chains, just to hang onto them, when we had this labor problem. Like an idiot. We would ride the entire night, pick them up and then ride the entire morning to deliver them to all these different stores, just to be able to have our merchandise, so they'd know we were still around.

JUDGE ROSE: This was --

THE WITNESS: Try to preserve the industry for them.

JUDGE ROSE: That was in 1967, after the lockout?

THE WITNESS: Yes.

JUDGE ROSE: Anything else of this witness?

Mr. Siskin?

MR. SISKIN: Yes, just one point, Your Honor.

CONTINUED REDIRECT EXAMINATION

Q (By Mr. Siskin) Did you ever use drivers in your operations?

A Yes.

Q Can you fix a point in time when you ceased using drivers?

A Well, we had one truck, and this truck entailed a driver, with a helper, with a packer on a packaging machine, and with a packer to pack them after they come off the packaging machine.

This will give you an idea what our labor costs were, before we got the bagels into the store.

The time for that was up until the time of the -- of the supposed lockout, we had them up to then.

Q Was that a Teamster Union?

A Yes.

Local 802.

Q Did they go on strike?

A Yes.

Q Can you fix a point in time?

A Well, at the time that we had the negotiations with the Bagel Bakers Union, they said that they would wait with negotiating with us, until we had finished with the Bagel Bakers, and that's the way it remained.

We never met with them after that.

Q Now, as best as you could, can you just fix the last date that you had one of the major chains as an account?

A Well, the last chain that we lost, that hurt us to the core, was the Food Fair chain.

That was my biggest account.

Q When was that?

A I would say, that must have been around November.

MR. SISKIN: I have no further questions of this witness, Your Honor.

JUDGE ROSE: Mr. Appell?

MR. SISKIN: I'm waiting for the next witness, Your Honor. He's supposed to be here by 11:30. We called him.

JUDGE ROSE: Mr. Appell, do you have any more questions of this witness?

MR. APPELL: Yes.

RECROSS EXAMINATION

Q (By Mr. Appell) You have not ever used drivers since February 1, '67?

A I beg your pardon?

Q You have not ever used drivers again since February 1,'67?

A No.

Q How much business did you derive from your wholesale in '67, when you went to Philadelphia?

How much did you derive that year?

A Well, what we did is, we filled up the truck as -- with as much merchandise as we could, and we delivered it to our key customers, so that we could maintain them, if we were able to ever resolve our problem with the Union.

Q Which customers?

A The Food Fair.

Q Who else?

A The Waldbaum stores.

The Grand Union Stores.

Some of our local bakeries.

Offhand, I don't recall exactly which ones.

Q This was during the lockout?

A Yes.

Q So, you still had these firms as customers suring the lockout?

A No.

We had lost them.

Q Well, didn't you say --

A We had lost them prior to that.

Q Didn't you just say that during the lockout, you were trying to --

A Well, I tried to, during the time of the lockout, when I lost them, then I went back and tried to get a competitive product, so I could compete with them.

Q I'm going to ask you again, during 1967, after the lockout started, did you have any business with Food Fair?

A Very little.

Q You had some.

A Yes.

Q How about Waldbaum's?

A Very little.

Q How about Grand Union?

A Very little.

The amount that I was able to pick up in Philadelphia.

Q For all of them, or just Grand Union?

A No, just for those few so I could maintain a foothold, to try to maintain a foothold trying to get back.

Q These three chains had Philadelphia stores?

A New York stores.

Q You did business with those three firms, to so extent, in New York, after the lockout in '67, is that correct?

A Very small.

Q Whom did you do business with in Philadelphia?

A No one.

Q Well, whom did you -- whom did you --

A Where did I get the bagels?

Q You went to Philadelphia to sell bagels, did you not?

A No.

I went to Philadelphia to pick up bagels.

Q You bought bagels and then you sold them in New York?

A That's right.

Line an idiot.

Q And did you also sell to some -- continue to sell in 1967, after the lockout, to small appetizers and groceries?

A No.

Q You had no small --

A No.

Q -- retail stores that you sold to?

A We had no equipment, we had no drivers, we had nothing.

Q So, you just dropped bagels at Food Fair, Waldbaum and Grand Union?

A For a limited time, up until -- for very limited time.

I don't recall the exact length of time.

Q How about to some small customers?

A We never went back to them.

Q Didn't you say earlier that you did?

A Well, --

Q Have some small customers during the lockout?

A That came --

Q On a wholesale basis?

A They picked it up in our place, but we never served them.

Q I see.

How many stores picked up in your place during the lockout in 1967?

A About four or five.

Q They were the same customers you had had the year before, in '66?

A I would say they were local stores from the area that would pick up a little bit.

Q Were they the same customers you had had in '66?

A Yes.

Q Do you have any records to show how many bagels you actually picked up in Philadelphia, during the lockout period?

A No.

MR. APPELL: No further questions, Your Honor. Thank you.

MR. SISKIN: No other questions, Your Honor.

JUDGE ROSE: Okay, you're excused, Mr. Cohen.

(Whereupon, this witness was excused.)

MR. SISKIN: Can I have a short recess, Your Honor? I'd like to get these other fellows that are coming in. I promise they'll be here before the lunch break.

JUDGE ROSE: We'll take a five minute recess.

(Whereupon, there was a short recess taken in the hearing.)

JUDGE ROSE: On the record.

We'll adjourn for lunch until 12:30.

(Whereupon, the hearing was recessed for lunch at 11:50 o'clock A. M.)

(Whereupon, the hearing resumed at 12:45 o'clock P. M.)

JUDGE ROSEN: On the record.

Call your next witness.

MR. SISKIN: Mr. Schilowitz.

JUDGE ROSE: Are you ready to go?

MR. SISKIN: As best we can, Your Honor.

Mr. Schilowitz, please take the stand.

Whereupon,

LOUIS Schilowitz

called as a witness, was duly sworn and testified as follows:

JUDGE ROSE: Please be seated.

State your name and address for the record.

THE WITNESS: LOUIS SCHILOWITZ, S-C-H-I-L-O-W-I-T-Z.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Schilowitz, how long have you been associated in the bagel bakery business?

A It's going to be fifteen years in November.

Q And at the present time, do you have an interest in a company known as Golden Bagel Corp?

A Yes.

Q What's your title in that?

A President.

Q Have you been President since the inception of the corporation?

A Yes.

Q Where is the shop located?

A 533 Kings Highway.

Q Has it always been located at that address?

A Same location.

Q That's in Brooklyn?

A Brooklyn.

Q Now, did you have a first in your establishment at one time?

A Yes.

Q Can you fix a point in time when that fire occurred?

A I think it was in '67, it was. The end of --

Somewheres in '67.

It's on record with the Fire Department.

Q Was it a major fire?

A It was -- Well, it was the, where we keep our records in the basement, and most of it was destroyed.

Q And prior to the time of the fire, had you placed certain records and certain records been retained by third parties, with your accountant?

A By the accountant, yes.

Q What was the name of your accountant?

A We had another accountant.

I think it's in there -- It should be in this --

Q Did you make an effort to obtain whatever records you could?

A Excuse me.

Right after Cohen & Fassman, we had another accountant.

Q Was his name Harry Helfeld?

A Harry Helfeld, yes.

He didn't take care of our books properly.

Q Did there come a time when you attempted to locate the records for the years 1966, '67 and '68, before coming h ere today?

A Yes.

I went through all of my records.

Q Did you find any records?

A Just what I brought here, and some of my past checkbooks, which I -- I just couldn't bring so many, but I brought as much as I could.

MR. SISKIN: I offer this Exhibit for identification, Golden Bagel Corp. financial statements for the period ending fiscal year ending August 31st, 1966, August 31st, 1965, and for the short period September 1, '66 to January 31st, '67.

JUDGE ROSE: Mark that Respondent's Exhibit 49.

(Respondent's Exhibit 49 was received and marked for identification, of this date.)

Q Is this the only financial report that you managed to bring today, for that period of time?

A That's the only one, yes.

Q Who gave you that?

Did you just bring it down --

A Yes.

Q -- from your attorney's office?

A Right.

Q From your former attorney's office?

A Yes.

Q Did you make a diligent effort to locate records?

A Yes.

I've been going through since we had these trial procedures.

(Whereupon, Mr. Siskin hands the above-mentioned document to Mr. Appell.)

MR. APPELL: Can I have voir dire on this, Your Honor? Is it offered yet?

MR. SISKIN: I'm going to offer it.

JUDGE ROSE: You may have voir dire.

VOIR DIRE EXAMINATION

Q (By Mr. Appell) Mr. Schilowitz, do you know who prepared this?

A Harry Helfeld prepared this one.

Q Were you present when this was typed up or made up?

A Yes, I was present.

I wasn't present, he probably did it in his office.

Q Do you know whether he got --

A I gave him all the -- all the items that had to be prepared, and he --

Q To your knowledge, were these figures taken out of your records?

A Yes.

Q Were they accurate?

A Yes.

Q For what purpose was this report put together?

A For what purpose?

For our business purposes.

Q Why did it end at January, '67 and not earlier -- and not later, I should say, for a full year, like everything else?

A I think this was when he finished --

I can't recall.

MR. APPELL: Your Honor, I'll have further questioning later on it on cross, I presume.

I have no objection at this time.

THE WITNESS: I have to get in tough with him.

JUDGE ROSE: Respondent's Exhibit 49 is received.

(Whereupon, the above referred to was received and marked Respondent's Exhibit 49 in evidence.)

CONTINUED DIRECT EXAMINATION

Q (By Mr. Siskin) Now, can you tell us what the circumstances were in your business during the years 1965, '66 and '67?

A 196 -- Well, 1965 was, we were doing a very nice business.

In 1966, we were starting to lose money, when we signed a new contract with -- which stated the -- which stated the Martin Siegel plant, wherever boxes of bagels was taxed for us, and from then on, our business was going right along. And in the summer, there was -- where we had -- we baked 80 boxes of bagels, we had to pay for a hundred, and we got three men come into the shop and bake for a hundred. And there were times when the -- we couldn't wait for a -- we had, on Saturday night, where we did some retail business, we had to wait three our four hours for a kettleman, and I lost a lot of retail business. My business was 80% wholesale.

We had -- I had the Horn & Hardhardt account, which was a hundred percent, and then the Lenders came in and took most of my business away, not only Horn & Hardhardt, and then we lost our business to W & S, with the bagel machines, all our chain stores.

Q Excuse me.

I just want to go slowly through what you're speeding through.

Can you tell us what wholesale accounts you used to have in your prime?

A Yes.

I had Horn & Hardhardt Stores, all the Horn & Hardhardt Stores, in New York City, all the Metropolitan area.

I had the Big Apple, Waldbaum, Royal Farms, and large appetizing stores we had.

Q Now, can you tell us what -- when the major loss in the wholesale accounts occurred, in what year or years?

A Well, towards the end of '66, we were starting to lose money. Starting --

Q When did you lose the wholesale accounts that you referred to?

A In '67.

We were starting to lose the wholesale accounts.

Q Was it in '66 or '67?

A The end of '66 and '67, we were slowly losing it.

In the end of '66, we lost Horn & Hardhardt, and then we started to lost the other ones.

Q You're sure you lost the Horn & Hardhardt account at the end of '66?

A Yes.

Q Who did you lose it to, do you know?

A Lenders Bagels.

Q How do you know?

A When you're doing business with a company --

There's a gentleman up there by the name of Mr. Romeo. He was the head of the department. And he was the head of the department. And he mentioned it to us, sorry, Mr. Schilowitz, but you lost the account to Mr. Lenders, because the price was -- was a very low price, and our board decided to go along with Mr. Lenders.

Q Did you attempt in any way to get the account back?

A Yes.

We not only -- I attempted, the Union attempted, too, and they couldn't meet the price.

Q In what way did the Union attempt?

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A They went up and tried to meet the price, but it was just impossible.

Q How did they try to meet the price?

A Well, I wouldn't know.

I know they went up there to try to meet the price.

MR. APPELL: Your Honor, if the witness cannot establish that he was present, I would move to strike any testimony as to what the Union did.

JUDGE ROSE: Sustained.

Q (By Mr. Siskin) Did you ask the Union to go up --

A No.

Q Now, what percentage of your business was Horn & Hardhardt's?

A What percentage?

I'll say, about one-quarter.

Q One-quarter?

A About 30%, I'll say.

Somewheres along there.

Q What was the next highest wholesale account?

A Then I had Waldbaum.

Q What percentage of your business was Waldbaum?

MR. APPELL: Can we fix a time for that, Your Honor?

Q In the years 1966 and prior.

A Waldbaum would be, Royal Farms, was another 39%.

Q So, is it fair to say that prior to the time you lost them, in the immediate, prior time you lost these accounts, Waldbaum's, Royal Fram, and --

A Big Apple.

Q -- Big Apple and Horn & Hardhardt, comprised approximately 60% of your business?

A Right.

Q Now, did you try to -- did you, yourself, try to preserve the other accounts?

A Well, I couldn't do nothing about the -- these large accounts, but I tried to preserve the little accounts that were surrounded around the bakery.

Like the little grocery stores and appetizing stores.

Q What, if anything, did you do to try to save the Waldbaum's account?

A I went up there to try to meet the price.

Q Who did you go up to?

A He's the head --

I can't think of his name.

Q Was he a man in a particular store?

A No.

He is one of the executives.

Q And --

A Maybe --

Do you remember his name?

MR. APPELL: Your Honor, I would object to the witness asking anyone for names.

JUDGE ROSE: That's right.

Just --

THE WITNESS: So many years went by, I just can't remember.

JUDGE ROSE: If you remember, okay, and if you don't, just say you don't remember.

Q (By Mr. Siskin) And who did you lose the Waldbaum's account to, do you know?

A The Waldbaum's accounts to?

Where these -- New bakeries that came in, who broke away from the Union.

Q How did you lose the Royal Farm?

A Same way.

Q Did you lose them to Lenders, in any way?

A I wouldn't know if I lost them --

No. I lost them to other shops, non-Union shops, I lost them to.

Q Do you recall when you lost these other three or four major wholesale accounts, Waldbaum's, et cetera?

A That was in end of '66, towards '67, the first month in about '67, I would say.

Q What steps did you do to pick up the slack, did you take to pick up the slack?

A We took in groceries. Dairies and groceries, we took in.

Q When did you start taking in dairies and groceries?

A When the -- At the end --

The first month of '67, in February.

Q Now, how many bakers did you hire -- did you have on a weekly basis, prior to the lockout?

A I had -- I think I had five. Five bakers all around, and two kettlemen. One was a steady one and one was a part timer.

Q Were these five bakers full time?

A Two were part time.

Q I see.

And after you lost the wholesal accounts, in January of 1967, how many bakers did you have working for you?

A After I lost?

I hust had three.

The Union wouldn't give me any less. I had to stay with three.

They wouldn't care how much money I lost.

Q And do you recall, in January of '67 how many boxes of bagels the men were making while they were working for you?

A Between 60 and 80 boxes a day.

Q Sixty or 80?

A Sixty, 70.

Q Were you being charged a hundred rate?

A A hundred rate; yes, sir.

Q Do you recall when the change came in requiring a minimum of a hundred boxes, specifically?

A When the change came in?

The change was on record for a hundred boxes.

Q Do you know when that occurred in the industry?

A When we had the Union contract.

That's the only time it occurred.

Going way back when I started in the business, it was always on record, a hundred boxes.

Q Okay.

Prior to --

A Excuse me, excuse me.

The name of the fellow I saw from Waldbaum's was Morriss Pitt.

Q Prior to the loss of the wholesale accounts, how many boxes were, on an average, were the men producing, the three full time men?

A Used to produce -- Used to bake during the week, about 12, 13 hundred boxes.

Q Each man?

A Each man.

I would say yes.

Their salaries was over $200.00.

Q Was that on a six day week, five day week?

A On a six day week.

Q And is it fair to say, then, that for these three bakers, that after you lost the accounts, that the production on the boxes were only 60 or 80, or under a hundred per day?

A Under a hundred.

Q Whereas, they used to be approximately 200 a day?

A That's right.

Q Now, will you tell us, to the best of your recollection, what your cash position was on or about January 31st, 1967?

A I was -- When I start losing these accounts, I was always running overdraft in the bank. All the time.

I was always losing money. Constantly losing money.

Matter of fact, if it wasn't for the -- for the vice-president in the bank, which we are -- the bank right now, I would be out of business a long time ago. He was carrying me. And I can even subpoena this man to come and to prove it.

Q Was that overdraft status on a daily basis?

A On a daily basis.

I have checks to prove it, that I'm O. D., overdrawn.

Q Were you overdrawn then?

A Yes.

Q In January 31st, '67?

A Yes.

Overdrawn from the first day until this present day.

I still can't catch up.

Q Was that true for the balance of the year '67 and for 1968?

A Yes.

Q Did there come a time when you had to put additional money into this business?

A I've been putting money in --

I haven't drawn a salary since May the 1st of this year.

Q During the years 1967 and '68?

A Yes.

My wife had to go out to work.

I draw only $50.00 a week, just my general expenses.

Q Can you fix a point in time?

Was that in '67?

A '67 and '68.

Q Was it true for part of '66, too?

A '66?

Maybe towards the end, probably.

Q Now, has your wife been working ever since?

A Yes, she's working ever since.

Q Was your wife assistant bookkeeper in the operation then?

A She was assistant bookkeeper for awhile, and then --

Q In '66 and '67 and '68?

A In '67 she was, not in '66.

Q Did you pay her any salary in '67?

A No, I couldn't afford to pay her salary.

So, she went out to work and she did this on her own time.

Q Did you have drivers all the time you had wholesale?

A Yes.

Q When you lost the wholesale accounts, did you let go the drivers?

A Yes, sure.

I had to. I think they --

The Judge --

Q They were not included in the number counts that you gave me before, is that correct, the five people that you had working?

A No.

Q Drivers are not included in that category?

A No.

Q Isn't that correct?

A No, they weren't included. No.

Drivers and bakers are a separate department with these people.

Q Can you tell us in the bagel industry, are there certain slack times during the year?

A Summer is slack time.

From, say, from the week after Passover until the Jewish holidays in September.

Q The so-called summer --

A Summer --

Q -- summer months, right?

A Yes.

Q When is the heavy time of the year, so to speak?

A In October until April.

Q Did you have a partner in the business at that time, '67 and '68?

A I had a partner up until '66.

He passed away.

Then I had a new partner come into the business.

Q Now, when the lockout started, did you have -- did you have any other labor besides yourself?

A When the lockout started?

Well, I had this new partner with me.

Q Pardon?

A I had a new partner with me.

Q Did you use any other labor?

A No.

Couldn't afford to have any.

Q How many boxes did you turn out in '67 and '68?

A '67? For the year, you mean?

Q Yes. Per day or per week.

A Per day?

Q Yes.

A '66?

Q '67?

A Well, '67 was only one month we were working.

Q Yes.

Then, after the strike or the lockout, how many boxes did you produce?

A We produced just for the retail, we produced about a hundred for the week. A hundred boxes.

Q A hundred boxes for the entire week?

A For the entire week, yes.

Q Or an average of twenty a day?

A Yes. That's right, yes.

My bakery is a wholesale bakery, and we were trying to build up the bakery.

Q Was that true in 1968, too?

A In '68, we were probably building a little more, because we put in dairy products and grocery products, and that started to bring in some customers into the bakery.

Q Now, did you ever go to the Union to ask for -- for a reduction in prices, or reduction in salary?

A No.

I went to the Union for relief in '66, to help me out. But they just turned their back to me.

Q Who did you go to?

A There was a Harold Laskowitz there, who was president at the time.

Q Was he also the Union delegate?

A An official, yes.

An official of the Union.

Q What did you say to him?

A I told him how much we were baking, and our daily expenses from the bakers, if he can only give us one man to make the 80 boxes, it would help us out.

He couldn't do it, he didn't know where to place his men during the strike time, and I had to just live with it.

Q Now, do you recall what your price of bagels was per dozen, on or about the last part of 1966?

A Last part?

It was about 60¢.

Q Sixty cents a dozen?

A To meet these chain store prices?

Q Yes.

And when you were inundated, or flooded, as you used, by the competition, did you discover what the competition was selling it for?

A They were selling it for about 35¢.

Q To your knowledge, was that industry-wide?

A Industry-wide, right.

Q Who were those people who were selling it for 35¢, do you know?

A W & S, and Landers.

Q Do you know whether the Union engaged in educational picketing of the chain stores?

A Yes. They were picketing, right.

Q Was that their assistance that they volunteered to you to try to help you?

A Right.

It didn't do any good.

Q Did you take steps to try to cut your overhead when you lost the chain store accounts?

A The overhead I had was my partner and myself and my wife.

Q I meant, the operational expenses.

The business, so to reduce the loss.

A I didn't have any help, so that was just my missus, myself and my partner.

Q Now, do you recall February 1, 1968, Judge Rosling's Order?

they wouldn't even let me bake a box of bagels for my retail business.

Q Did you have retail business, Mr. Schilowitz?

A No retail business.

Q You did not retail in '66?

A My bakers wouldn't let me have retail business.

Q Did you have any retail in '67?

A '67, I had retail after they walked out, I started to do retail business, yes.

Q Now, prior to the lockout, didn't you say before that your business was 80% wholesale?

A Right.

Q What was the other 20%?

Wasn't that retail?

A Well, I'll say retail.

Yes, it was --

More or less, I had some peddlers come in and pick up bagels, which we called that retail.

Q Did you sell across the counter at all?

A That's right.

Well, I didn't get a retail price for it, but we called it a retail business.

Q Did you sell over the counter to people?

A Over the counter?

Q Prior to the lockout?

A During the lockout?

Q Prior to it, before it.

A If I sold for the day 5 dozen bagels, it was a lot.

Q But that was part of your business to sell over the counter?

A That's right, yes.

They wouldn't let me -- They wouldn't even let me amke a box of bagels.

MR. APPELL: I move to strike, Your Honor.

JUDGE ROSE: Sustained.

Q (By Mr. Appell) Now, Mr. Schilowitz, did you lose Waldbaum's accounts in 1967?

A Yes.

Q And Royal Frams in 1967?

A Yes.

Q And Big Apple in 1967?

A Right.

Q Is it correct that you lost all those accounts after the lockout began?

A No.

I lost them before the lockout.

Q You didn't have any business with them after the lockout?

A No.

Q None at all?

A No.

Q And, therefore, you lost them in January, '67?

A I lost them in --

I lost them about, in around November of '67 -- '66, I mean, I start losing them very slowly.

I lost Royal Farms one month, and then I lost Waldbaum's another month, and then the Big Apple another month, because they were slowly creeping in.

Q Didn't you testify you lost all these companies, other than Horn & Hardhardt, in January, '67?

A I don't get you.

Q Didn't you testify earlier that you lost all these accounts, other than Horn & Hardhardt, in '67?

First month in '67?

A Yes.

Q And is that correct?

A Yes.

Q What?

A Yes. I lost them all.

Periodically, I've been losing them.

Q Do you have any records that still exist to show the amount of business you did with each of these customers in the years '66 and '67?

A As I say, we had a fire, and I had all these records in the basement.

I wanted him to stay the four hours. He was going to get paid for a hundred boxes.

HEARING OFFICER: That's enough.

You have your answer.

Go on, Mr. Appell.

MR. APPELL: Your Honor, I have no further questions at this time, pending the production of additional records.

JUDGE ROSE: Okay, Mr. Siskin, anything further?

MR. SISKIN: No.

I'll take Mrs. Schilowitz.

JUDGE ROSE: I have a question.

MR. SISKIN: I'm sorry.

JUDGE ROSE: I have a question for you.

As I gather from your testimony, you were having some difficulty with your business, and with the Union in 1966, is that right?

THE WITNESS: Right.

JUDGE ROSE: The business was such that they were making 80 boxes and you were paying them for a hundred?

THE WITNESS: Right.

JUDGE ROSE: And this was all the result of losing some of the wholesale business?

THE WITNESS: Right.

JUDGE ROSE: My question is, were these factors, this difficulty that you were having with the Union, was that part of the negotiations with the Union that led to the lockout?

THE WITNESS: No.

Had nothing to do with the lockout. Nothing. Because this was my own personal way of approaching the Union.

And ever shop had their own problems, I imagine. But it had nothing to do with the negotiations.

JUDGE ROSE: You were negotiating a new contract with the Union, weren't you?

THE WITNESS: Yes.

We were negotiating a new contract the first of the year, but we were all telling the Union our problems.

JUDGE ROSE: Were these problems part of your negotiations with the Union?

Were you trying to get the Union to agree to certain relief?

THE WITNESS: Yes.

JUDGE ROSE: In your contract?

THE WITNESS: Right.

JUDGE ROSE: And then you ended up engaging in the lockout?

THE WITNESS: Right.

JUDGE ROSE: Because the Union wouldn't give you that relief, is that right?

THE WITNESS: Right.

JUDGE ROSE: So, would it be fair to say that these problems that you were experiencing, in your business, relating to the cost of labor, were part and parcel of the negotiations then?

THE WITNESS: Yes.

JUDGE ROSE: And were part of the lockout?

THE WITNESS: Right.

JUDGE ROSE: Okay.

Mr. Siskin, anything further?

MR. SISKIN: No, no further questions.

JUDGE ROSE: Mr. Appell?

MR. APPELL: No, sir.

JUDGE ROSE: You're excused.

Thank you.

(Whereupon, this witness is excused.)

MR. SISKIN: Mrs. Schilowitz.

Whereupon,

RAY SCHILOWITZ

called as a witness, was duly sworn and testified as follows:

JUDGE ROSE: Please be seated.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mrs. Schilowitz, what is your title with Golden Bakeries?

A Bookkeeper, I suppose.

Q Were you a part-time bookkeeper for that Corporation back in '66, '67, and '68?

A Right.

Q Did there come a time when there was a fire?

A Yes.

Q Can you tell us when that fire occurred?

A I'll tell you in a minute.

It was in January -- it will be 12 years this coming January.

JUDGE ROSE: Off the record.

(Discussion off the record.)

JUDGE ROSE: On the record.

Q (By Mr. Siskin) Mrs. Schilowitz, were you familiar with, somewhat, with the day to day customers, wholesale customers that your husband had in the business?

A Yes, very.

I mean --

Q Do you recall your going to any one of the major accounts and asking that they stay with your husband's business?

A I do.

Q Will you tell us -- first, can you fix a point in time when this occurred?

A The latter part of '66.

Q Will you --

A October, November.

Q Will you tell us what transpired?

A Around that time. October, November.

First we'll go to Horn & Hardhardt, who was our biggest customer. Went to Mr. Romeo.

He said he gets it for, I think 50¢ a dozen.

I don't want to quote the price, I don't remember.

If we give it to him for 45, he'll take it.

We couldn't, not with Union help. They were costing us about 70¢ a dozen at the time.

So we had to let the account go. All right.

Next we had --

Q Did you, yourself, go to any other accounts?

A I went with my husband.

At one point I think I went with our accountant, if I'm not mistaken, but I know I went with my husband. We went to Big Apple, and Irving Shatzman, who was the buyer for the appetizing, told us the same thing. They gave the account to Gourmet.

Also, they make machine made bagels. I don't know if you're familiar with.

Also, they gave them a ridiculous price. They said I'll give it to you, but it's got to be like 5¢ below.

MR. APPELL: I would move to strike the testimony as to machine made bagels, unless it can be established that this witness saw the --

JUDGE ROSE: Sustained.

Mr. Siskin, this is not helpful testimony.

If this witness knows something, okay. But if --

MR. SISKIN: Your Honor, she's testifying to who she saw and what she saw, in order to preserve the accounts.

That has been made an issue by Counsel, a number of times before, and I'd like the testimony to stay in the record.

I think it does serve a useful purpose.

JUDGE ROSE: It's too vague and speculative to be of any use.

MR. SISKIN: It's at a point immediately prior, Your Honor, to January, 1967.

I don't know what -- if that doesn't establish what remedial action these people did to try to preserve their business, which means a lot to them, and try to preserve their accounts, in this case it was their major business --

JUDGE ROSE: She can talk about the fact that she lost accounts, if she knows, she's the bookkeeper.

But she can't talk about ridiculous prices, and she can't talk about what other people are doing. She can't testify to things she doesn't know about.

MR. SISKIN: She testified she went to these people. That's her own personal knowledge. Strictly on her own.

JUDGE ROSE: It's hearsay, Mr. Siskin.

MR. SISKIN: She went to the account herself.
That's not hearsay.

JUDGE ROSE: It is .
Let's go on. Let's go on, Mr. Siskin.
I made my ruling.

THE WITNESS: You can go to Horn & Hardhardt.

JUDGE ROSE: No, Ma'am.
You're a witness, you just answer questions.

THE WITNESS: I'm sorry.

Q (By Mr. Siskin) Did there come a time when you -- when you went to Waldbaum's?

A Right.

Q You, yourself?

A I saw Julia Waldbaum in person.

Q Did you discuss prices with the buyer?

A Same thing. She didn't give it to one of the -- I think it was G & S Bakery, I'm not -- I think that's what it was.
But they were giving her a low price. I believe they weren't a Union shop.

Q Can you fix a point in time when that occurrec?

MR. APPELL: Your Honor, I move to strike the testimony about G & S, unless it can be established the witness had direct knowledge.

THE WITNESS: That's who they gave the business to.

JUDGE ROSE: Please don't interrupt.

THE WITNESS: I'm sorry.

JUDGE ROSE: Sustained.

Q (By Mr. Siskin) Can you tell us when you went to Julia Waldbaum?

A It was around Thanksgiving, in '66.

Q And do you know whether you retained the account after you went to the meeting?

So that you lost the account at that point?

A We lost the account.

Q Do you know when you went to Mr. Romeo's office, of the Horn & Hardhardt Chain?

A Also -- it was all around the same time.

Q Now, were you familiar with the financial condition, the financial straits of the business, at that point in time?

A Very familiar.

Q How were you familiar?

A Because it was so hard to make payments, that we were paying off flour people $50 a month, a week.

Q Were you the bookkeeper that took charge of the checkbook so to speak?

That's my handwriting there, right.

Q Those checks were written out by you.

A Right.

Q You maintained the preliminary records at that time?

A Right.

Q And do you recall the financial straits of the business at that point?

A Very definitely.

Q What were they?

A Terrible.

Checks were --

Q In what way were they terrible?

A First, issuing checks, we didn't have money. We're issuing them, we know we're doing things against the law. We had to do it.

We're buying flour. Some of our payroll checks came back. Check with the bank. We had a nice manager in the bank, that extended us credit.

We were overdrawn at one point $8,000, and he was gambling with his job okaying our checks.

Q Was this prior to the lockout?

A Right.

In fact I had a check that I had given Willy Brier, that bounced. I cashed it with my own personal money.

We weren't drawing any salary.

At one point we were drawing $50 a week.

When you pay your Union help 500, and you draw 50, that's how bad the Union is.

Q Do you know when the payroll began to slacken up, the payroll to the Union began to get lighter in 1966 or 1967?

Do you know whether the payroll did slacken up?

A It did.

May I bring in a point?

Q No.

Just answer the question.

Did the payroll slacken up?

A It did, about a year before the strike. The lockout.

Q When did the heaviest part of the -- of the decrease occur?

A We lost all our wholesale, most of the wholesale business, the greater part.

Q Do you have those payroll -- do you believe you could locate those payroll records for that period of time?

A I have some of the payroll records, right.

May I ask, if we have canceled checks to show it, if I can't find the records?

Q First try to bring the payroll records in, Mrs. Schilowitz.

A All right.

MR. SISKIN: I have no further questions of the witness.

Thank you.

(Whereupon, the witness was excused.)

MR. SISKIN: Mr. Rubinstein.

MR. APPELL: Did Your Honor rule on my motion?

JUDGE ROSE: Overruled.

It may stand.

Whereupon,

JOSEPH RUBINSTEIN

called as a witness, was duly sworn and testified as follows:

JUDGE ROSE: Be seated.

Off the record.

(Discussion off the record.)

JUDGE ROSE: On the record.

DIRECT EXAMINATION

Q (By Mr. Siskin) Mr. Rubinstein, how long have you been in the bagel business?

A All my life practically.

Q When did you first acquire a shop?

A 20 years ago.

Q Was that Rubinstein Bagels?

A Yes.

Q Is it located in the Bronx and has been located in the Bronx since it's inception?

A Yes.

Q Now, are you the president of this Company?

A Yes.

Q You were the president during 1966, '67 and '68?

A No.

Q What were you?

A I was secretary.

Q Now, did there come a time when your hand-craft end of the business began to get competition from machine made bagels?

A Yes, it did.

Q Can you reflect and tell us to the best of your recollection, when that time began to be material and substantial in relation to competition?

A Well, at the beginning of 1966, things were pretty good.

But toward the middle of 1966, our production started to drop.

Q And was that reason because your sales were going down?

A Yes, sir.

Q And do you know who the competition was?

A I do.

Q Who was that?

A Lender's Bagels, Able's, Gourmet Bagels, and W & S from Throgs Neck.

Q Can you tell us whether you met with the Union in attempting to alleviate this problem.

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A I lost several big accounts to W & S, and Lender's, and I don't know who else I lost them to, but I did notify the Union to such, which they already knew, because of the big drop in production.

Q Who were those big accounts?

A Daitch Chain. Daitch-Shopwell. Duvernoy Baking Co., Gnome Baking Co.

Q Do you want to spell Gnome?

A G-N-O-M-E.

And some, you know, independent stores.

Q When did you lose those accounts?

A About the middle of '66.

Q And did -- is that the factor that created the direct effect of reduced production of bagels?

A Certainly did.

Q Did that result in reduced labor?

A Yes.

Q Now, can you tell us to the best of your recollection, whether you ever had a meeting at the scene or the business place of one of the machine made bagels?

A When I found out that W & S was in production, in Throgs Neck, I went over there on my own.

I was interested to see what kind of an operation he had. When I went in there, he had two or three Thompson machines, he had automatic ovens, which I had never seen before.

They came from Sweden.

You just push a rack into the oven, and the bagels bake without even handling them. He had a lot of refrigeration, freezers, baking machines.

It was quite a big operation, from what I saw.

Q Now, did you go to the accounts and try to retain those accounts?

A Either I went there or called them, I don't recall. I tried to get them back.

Q Do you recall what the price of bagels was at the time that you were producing them -- selling them for?

A We were selling a wholesale price, the bagel was about 60 to 65¢ a dozen.

And the price that the competition wanted was about 40¢ a dozen, 35.

MR. APPELL: Your Honor, I move to strike what the competition wanted, unless it can be established that it is not hearsay.

JUDGE ROSE: Can you establish the witness' basis of knowledge on that?

Q Can you tell us how you knew the competitive price was 40¢?

A These accounts told me. When I approached them and asked them why they discontinued my service, they told me they were getting bagels for, I don't remember the price, whether it was exactly 35 or 40, but it was in that area, and I knew I couldn't meet it.

And they asked me if I would meet the price, they said they'd give me the account, and I told them I couldn't meet it.

MR. APPELL: I renew my motion.

JUDGE ROSE: That's probably hearsay, but I'm going to let it stand.

Q (By Mr. Siskin) Did there come a time when you approached the Union and asked for some special concessions so you could meet this competition?

A Well, I happened to be on the negotiating -- on many negotiating committees with the -- for the contract, and I appeared at most every meeting that the committee, from the Council, appeared, and we were always asking for help, since the beginning -- since the middle of 1966, since this competition came into effect.

Q Now, did you have an accountant at that time?

A Yes, I did.

Q What was his name?

A Mr. Norman Levin, L-E-V-I-N.

Q Did he subsequently die?

A He did.

Q When did he die?

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A Five years ago.

Q Did you attempt to locate the records from him?

A I did.

Q Were you successful?

A No, I couldn't get them.

Q In the shop itself, did you maintain certain day to day records, production records?

A Yes.

Q Did you bring those records with you today?

A Yes, I got them.

MR. SISKIN: Off the record.

JUDGE ROSE: Off the record.

(Discussion off the record.)

JUDGE ROSE: On the record.

Q (By Mr. Siskin) Mr. Rubinstein, did you maintain a record of production, a labor record --

A Yes.

Q In your daily record keeping?

A Yes, I did.

Q Did you bring that with you today?

A Yes, sir.

MR. SISKIN: Can I have this marked for identification, please?

It's called a Production Record of Rubinstein Bakery for the year 1966.

(Respondent's Exhibit 50 was received and marked for identification, as of this date.)

Q (By Mr. Siskin) Do you have any other records for any other years like this, for '67 or '68, or 65?

A '67 or '68?

Q Yes.

A No.

Q How about '65?

A They might be in the office. I wouldn't know.

Q If you -- will you make a diligent effort to obtain it and bring it in?

A I certainly will.

Q Or any other records that you might have.

Now, will you tell us what information was contained in this record?

A The information in those records were the production of each individual day, each individual man, how many bagels me makes, and where he works, by the bench or the oven. The production of the shop. The number of bagels baked each day.

Q Did it contain your basic amount of boxes of bagels for each day for each --

A Yes, it did.

Q Could you establish a norm by looking at a week's production?

A Yes.

Q And, comparing it, say, at the beginning of the year and the middle of the year and the end of the year?

A Yes, sir.

Q All right.

Could you do that for the months of January -- for -- withdrawn.

Could you, from this information, ascertain what the production would be on a weekly basis or on a daily basis or on a monthly basis, by months?

A Yes, I do.

Q Did you maintain this record in your own handwriting?

A Either myself or my bookkeeper at the time.

Q Did you supervise its accuracy?

A Yes.

If I didn't write it down, I gave the figures to my bookkeeper for him to enter in those pages.

Q So, the basic source data was your data?

A Yes.

Q And did you get a chance to review this before you came here today?

A Yes. I looked through it.

Q All right.

Will you tell us what you noticed with respect to production during the year 1966, production of your boxes of bagels?

A Yes.

From the beginning of the year of 1966 to the end of the year, before the lockout, production dropped about two thirds.

Q And can you --

A Roughly.

Q Do you know what the reason was for that production dropoff?

A Loss in accounts, loss in production, loss in customers.

Q And do you recall when the sharpest drop came about?

A Just about the last few months of 1966.

Q Can you make an exhibit which will incorporate this change, and have it here by Monday so it can be reviewed by counsel for the NLRB?

A Yes, I will.

Q Will you save your tapes or whatever you used to extract this information in summary form so he will find it fairly quick to check out?

A Yes, sir.

Q Now, do you recall when you asked the employees to come back, or employees were sent back to the shop?

A Yes.

In 1968, February 1968.

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Q He did --

A He didn't come in every day.

Q This was done on a two-day basis?

A He would come in either one or two days a week and do that kind of work. We used to freeze the bagels, he had a freezer where they would break off and I would keep them in a freezer.

Q Now, did you ever call on Mr.Laskowitz and ask for anybody to -- ask for anyone to be sent over after February, 1968?

A Did I ever call and ask him?

Q Yes.

A No.

Q Did you ever retain any of the accounts that were lost in the wholesale business?

A No, I did not.

Q Is it fair to say that you had lost all of your wholesale accounts prior to the lockout?

A Not all of them.

Q What percentage of your wholesale business?

A Well, if I dropped two-thirds of my production, I must have dropped about two-thirds of my wholesale business at that time, from the beginning of 1966 to the end.

Q This was all prior to the lockout?

A Yes.

Q You tell us what percentage of your business was represented by each of the wholesale chains that you had lost prior to the loss.

What percentage did each of these accounts comprize of your annual volume?

A These chains I lost?

Q Yes,

A I would say about -- I lost about, as I said before, if I lost two-thirds of production I must have lost two-thirds of the accounts.

Q Now, did you obtain your 1966 copy of your corporation tax return from Mr. Brickman, the lawyer at the time, today?

A I think the NLRB had those copies.

Q But --

A You are referring to the --

MR. SISKIN: I am going to mark this for identification, corporation tax return, Rubenstein Bagels, Inc., 1966.

(Thereupon, the document referred to marked Respondents' Exhibit 51 for identification.)

A Mr. Brickman had that.

Q (By Mr. Siskin) Is this a true copy of the corporation tax return, to the best of your recollection, that you filed in 1967 for 1966?

A Yes, it is.

Q A true copy of the first two pages; isn't that correct?

A Right.

Q You will notice I did not have the remaining pages.

A Yes.

Q Did you get this today from Mr. Rubenstein -- from Mr. Brickman's files?

A Yes, I did.

Q Was Mr. Brickman your attorney at the time in 1967?

A At the time he was; yes.

MR. SISKIN: I offer this in evidence.

MR. APPELL: No objection.

JUDGE ROSE: Respondent's 51 is received.

(Thereupon, Respondents' Exhibit 51 for identification, received in evidence.)

Q (By Mr. Siskin) Can you attribute to the best of your recollection the principal reasons for the loss that you sustained of $26,000 in 1966?

A The loss of accounts and loss of production in bagels due to the competition.

MR. SISKIN: No further questions, your Honor.

JUDGE ROSE: Mr. Appell.

MR. APPELL: Your Honor, I call upon the--

THE WITNESS: Yes.

MR. SISKIN: Would you make an effort to search thoroughly?

THE WITNESS: Let me know what you want.

MR. SISKIN: 1965 through 1971, inclusive, all production, sales, financial, payroll, W2s, weekly payroll records, general ledgers, and financial statements.

THE WITNESS: I will look for them.

MR. SISKIN: Will you produce them on Monday?

THE WITNESS: If I have them; yes.

MR. SISKIN: If not, will you sign an affidavit that you searched diligently and could not locate them?

THE WITNESS: My accountant --

Can I say something?

JUDGE ROSE: Yes. Go ahead.

THE WITNESS: My accountant,who is deceased now, might have had them in his office and I would be able to get them, if he had them. But if I got them in my office, I will certainly make an effort to bring them down.

CROSS EXAMINATION

Q (By Mr. Appell)' Mr. Rubenstein, do you have any personal knowledge of any accounts that Ables or Lenders took from you?

A Personal?

Q Yes.

A Almost every supermarket that I supplied had them in their stores.

Q How about Gourmet's; same thing?

A Yes.

Q W & S?

A Yes.

Q How do you know they were W & S?

A I saw some packages of his at one time, and then I was told by these accounts that W & S was supplying them with the bagels.

W When did you lose Daitch Shopwell?

A In the middle of -- sometime in the middle of 1966.

Q How do you remember that date?

A How do I remember the date?

Q Yes.

A There is no specific date; it is just a period of time. I don't remember what date it was; it was sometime in 1966.

Q Did you lose any wholesale accounts during the lockout?

A During the lockout?

Q Yes.

A What period of time are you referring to?

union when you set up A & B; isn't that correct?

A Yes, sir.

MR. SISKIN: I have no further questions.

JUDGE ROSE: You're excused.

Thank you.

THE WITNESS: Thank you.

(Witness excused.)

JUDGE ROSE: Call your next witness, please.

MR. SISKIN: Mr. Chakofsky.

Whereupon,

DONALD CHAKOFSKY

called as a witness, having been first duly sworn by Judge Rose, testified as follows:

DIRECT EXAMINATION

BY MR. SISKIN:

Q Would you pleass tate your full name for the record?

A Donald Chakofsky.

Q What's your home address?

A 2934 Bond Drive, Merrick, Long Island.

MR. SISKIN: Your Honor, this is the point in the case where I believe Mr. Kramer will be heard with respect to Oscar Stern and that corporation.

I think this should go off the record.

JUDGE ROSE: I think it should stay on the record.

MR. SISKIN: Okay.

At this point, your Honor, I'm just wondering whether this should be handled any differently from the rest of the testimony, because first I'm going to have my witness testify as to that jurisdictional defense.

JUDGE ROSE: Well, just ask him the questions.

MR. SISKIN: Okay.

JUDGE ROSE: And then if Mr. Kramer wants to cross-examine him, he may.

MR. SISKIN: Ye, sir.

BY MR. SISKIN:

Q Mr. Chakofsky, did there come a time when you went into the bagel bakery business?

A Yes.

Q Had you first been an employee?

A Of --

Q Of any companies.

A Yes.

Q Had you had prior bagel experience --

A Yes.

Q -- prior to forming a company?

A Yes.

Q Were you a member of a union?

A Yes.

Q What was the number of years that you had been in the union prior to your acquiring this shop?

A 18, 19 years.

Q Prior?

A Prior.

Q Prior to the time --

A Right.

Q -- that you commenced work in the business of bagel baking under your own shop?

A Right.

Q Now, Mr. Chakofsky, will you tell us whether you entered into a business for -- wherein you purchased certain machinery and a bagel business, so to speak?

A When?

Q Yes.

A June, 1967.

Q What was the name of that business that you purchased under a bill of sale?

A Neptune Bagel Bakers, Inc.

Q Now, did you utilize any customers of that business?

A No.

Q Well, what were the nature of the customers prior to your taking over?

A It was all wholesale.

Q And when you took it over, were there any wholesale accounts?

A No.

Q Were you in business with anybody else?

A These accounts told me. When I approached them and asked them why they discontinued my service, they told me

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A Yes.

Q Who?

A My brother-in-law.

Q What was his name?

A Robert Krublit.

Q Where was that business locared?

A He's 71 Neptune Avenue, Brooklyn, New York.

Q Now, from the time you went into business, sir, did you work full time for that business?

A When I went into business?

Q Yes.

A Yes.

Q Did your brother-in-law --

A Yes

Q -- work full time, too?

A Yes.

Q Now, Mr. Chakofsky, will you tell us whether you used any of the routes of the old --

A There were no routes. They were all gone.

Q Was it a closed bakery shop when you had purchased it?

A Yes.

Q For how long?

A For about four months.

Q It had been closed?

A Yes.

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Q That is to say, the store was shut?

A Yes.

Q And to the best of your knowledge, sir, was there any reason why it was shut?

Had the man gone out of business?

A The man had closed --

MR. APPELL: Objection.

JUDGE ROSE: How can he know?

MR. SISKIN: Okay.

JUDGE ROSE: Sustained.

BY MR. SISKIN:

Q Did you take over any lease of the premises or did you negotiate a new lease?

A I negotiated a new lease.

Q So, is it fair to say that you did not acquire any of the lease carryover from the predecessor business?

A No.

MR. APPELL: Objection to the form of the question, your Honor.

JUDGE ROSE: I sustain that.

Come on, Mr. Siskin.

MR. APPELL: Move to strike the answer, your Honor.

JUDGE ROSE: Yes.

BY MR. SISKIN:

Q Now, did you, once you took over this operation, go strictly into retail?

A Yes.

Q Did you acquire any of the machinery of the operation?

A Yes.

Q Will you tell us whether you used any of the machinery and whether you didn't use any of it at all?

A I used only part of it.

Q And what machinery did you disregard when you started the operation?

A Dough mixer and a bagel grinder and all the benches.

Q When did you become a member of the Bagel Bakers Council?

A June of '67.

Q Now, you purchased the business in June of 1967, did you not?

A Right.

Q You purchased the --

A Right.

Q -- whatever the machinery was?

A Right.

MR. KRAMER: Objection, your Honor.

There's a document in evidence with this witness' signature on it.

If he wishes to impeach his own witness, go right ahead.

MR. SISKIN: We're not arguing that point. We're talking about joining the Bagel Bakers Council.

MR. KRAMER: You said when he purchased.

JUDGE ROSE: Go on to another question.

The objection is sustained.

BY MR. SISKIN:

Q You started the business in June of 1967.

But when did you first become a member of the Bagel Bakers Council?

MR. APPELL: I object.

The question has been asked and answered.

JUDGE ROSE: He said June of 1967, Mr. Siskin.

Let's go on.

BY MR. SISKIN:

Q When did you first pay dues to the organization?

A June of 1967.

Q Now, did there come a time when you ascertained that you were a respondent in this proceeding?

A Repeat that, please.

Q Well, did there come a time when you learned that you were a party involved in this action, in this proceeding?

A Yes.

Q When was that?

A Around two or three months ago, I think.

Q And prior to that time, sir, had you ever received any notice?

A No.

Q From the NLRB?

A No.

Q Had you ever given the NLRB any of your books or records?

A No.

Q Had they ever requested that you give them any of your books and --

A No.

Q -- records?

A No.

Q Had anybody from the NLRB ever contacted you prior to --

A No.

Q -- two or three months ago?

A No.

Q Now, did you bring with you, sir, certain books and records, payroll records --

A Yes.

Q -- of your company?

A Yes.

What was the full legal name of your company?

A Neptune-brighton Bagels, Inc.

Q And has it retained that name from the time you started in June of 1967?

A Yes.

Q And was the new corporation established in June of 1967?

A Yes.

Q Now, do you recall whether in February of 1968 you asked the union to send back any of their employees?

A Yes.

Q Did you --

A They came back on February 1st of 1968, I believe it was.

Q When you say "They," who is "They"?

A The union.

Q Can you give us the names of any of the employees who returned?

A Yes.

Q Please.

A Jacob Kleiner, Samuel Rubinstein, Leonard Weinstein, Jacob Malinowsky, Harry Haberman, Arther Werner, Donato Cozzolino, Erwin Renner, Irving Berlin, Joseph Richards, Frank Passalacqua, Martin Salkend, Jacob Wasserman, David Aronowitz, Sam Lerner, Daniel August, Daniel Krasner, James Doley, Joseph Silverman, Ralph Balotta, Julius Brooks, Henry Borkin, Warren Russakow.

Q And did all of these employees return to you in

February of 1968?

A Well, they came one at a time. They came and they left, they came and they left.

You know, they just -- the union sent down men and they didn't want to work, so they left.

They worked a day or two and then they were gone.

Q And was that continuously for the period of time that --

A It continued into --

Q Was there any gap in time that these employees returned and didn't work?

A No.

They worked continuously until -- there came more men in 1969, too.

Q Pardon me?

A They came more men in 1969.

Q No; in 1968.

A Well, they worked right through until 1969.

Q There was no interruption in employment from the time that they returned in February of 1968?

A No.

Q Is it fair to say that from the time you took the employees back, there was no interruption of union employment in your shop?

A No.

Q There was no period of time when they refused to send any workers?

A There were days that no one came in, you know, like one or two days that they didn't show up at all.

I would call the office. He had nobody to send in, do it yourself.

Q And that was in February or March or April of 1968?

A Right.

There were certain days that no one showed up.

Q Had these people ever worked for you before?

A Before I bought the bakery?

Q Well, before February of 1968,

A No.

Q And had you made a phone call to the union telling them to send people back?

A Yes.

Q To your shop?

A Yes.

Q Do you recall who you spoke to?

A Harold Laskowitz.

Q And what did you say to him and what did he say to you?

A I told him that I understand that the Council is taking the men back, the Council is taking the men back under this 60-day injunction, was it?

February 1st they were forced to take them back in again.

I told him to send men to my shop also.

Q And what did he say?

A Okay.

Q Did you request specific names?

A No.

Q Would you have known of any specific names?

A No.

You weren't allowed to request names. Who they send in, that was it. You know, you didn't have any choice.

Q And did there come a time when the union stopped sending people?

A Yes.

Q When was that?

A The last man who worked for me was Kenneth Becker. He worked there on a Thursday, July 3, 1969.

I had a -- I had a man working for me, Jack Fruchtman, who was a union man, who did most of my work in my shop.

He stopped coming in because he went to work for his grandson who opened a bagel bakery up.

Q Was he a union man?

A Yes.

Q Now, do you recall how many boxes these people made when they came to work for you?

A Yes.

The worked themselves. It was a -- like, I would have one man during the week work. He'd do all the work himself during the week. He would make about 40 boxes himself.

He would get paid for a hundred. Forty would be 80. He replaced two men. He would get paid for a hundred.

Q So, to the best of your recollection, are you telling us that the union people you did hire did not make the minimum when they returned?

A Some days they did and some days they didn't. Weekends they did, and during the week, most of the time, they didn't because we were strictly a retail store. Whatever we sold retail, you know, that was it.

Q Now, did you ever pick up any wholesale accounts?

A No, no.

Q Now, do you know whether Oscar Stern ever had any wholesale accounts, to your knowledge?

A Huge wholesale accounts.

Q How do you know?

A I worked for him.

Q Can you tell us how many union drivers he had?

A He had two drivers and a helper.

I recall at least that many. He had two trucks.

Q Did there come a time when you worked for him when you were told that there was no business?

A No.

I worked for him before this.

Q Well, did he suspend operations at a given point in time?

A I don't know when he suspended them. I don't know when he stopped operations. I have no idea when, the exact date, you know.

Q Well, isn't it a fact that the store had been closed?

A Yes, yes.

When I took it over, you know, it was closed.

Q Was Oscar Stern the sole principal of that company?

A To my knowledge, yes.

Q Now, did the men make any complaints to you when they came back to work for you?

A Well, they expected to have more work, but there wasn't the work there.

There were no routes no more. The routes were gone. The routes were all absorbed by other shops.

Q Do you know what the relative percentages were of wholesale and retail at the time that you were an employee of Oscar Stern's company?

A About 90 per cent, 95 per cent wholesale and about five, 10 per cent retail.

Q Now, did you buy any trucks --

A No.

Q -- from Oscar Stern?

A There was a truck involved there, but we never used it. We sold it, my partner and I.

Q Did you ever buy any --

A In other words, that was thrown in with the bakery itself. It was there at the time.

Q Did you ever have any drivers working for you?

A No.

Q Would drivers have been necessary for a wholesale operation?

A Yes, yes.

Q Now, until February of 1968, that is, from the time you started in June of 1967, did you have anybody working for you besides yourself, that is, baking bagels?

A After --

Q As soon as you started in business.

A No, no.

It was just my partner and I.

Q Pardon me?

A My partner and I, that's all.

Q Had you been union men at the time?

A When?

Q In 1967 when you started this, in June of 1967.

A Yes.

To my knowledge, we're still union men, as far as I know.

I mean, they say no. You know, It's questionable.

Q Well, did you continue paying dues?

A They wouldn't accept the dues. They wouldn't accept the dues, the union.

Q Did you tender your payment of dues?

A I tendered my dues and they turned it back to me.

Q That was in 1967?

A Yes.

Q Was your partner a union man also?

A Yes.

MR. APPELL: I object.

JUDGE ROSE: Sustained.

BY MR. SISKIN:

Q Who owned the building that you had this --

A Oscar Stern.

Q -- bakery in?

A Oscar Stern.

Q Was that true all during the time that you had the bagel stop?

A Up until a few months ago, at which time he transferred it over to his son.

Q Was that Oscar Stern personally or that was his corporation that owned the building?

A I believe it was his corporation. I'm not a hundred per cent sure of that, though.

Q Well, whom did you make the checks out to for rent?

A Oscar Stern.

Q And was there any other use for this business besides the bagel bakery?

A No.

Q So, is it fair to say that the entire building was used --

A No, no.

There were two apartments upstairs.

Q I see.

And except for those two apartments, is it fair to say that the rest of the building was utilized in this bagel business?

A Right.

Q By you?

A Right.

Q Now, did Oscar Stern teach you any part of this business or did he have any connection with you after you took it over?

A No.

Q Did he give you any period of service or employment?

A No.

Q Did he give you a lease of the business at the time -- a lease of the building at the time you started, in June of 1967?

A The whole building?

Q Of your portion of the building.

A Yes.

Q How long was that lease for?

A I think it was tendered.

Q Was it --

A It was five and five.

Q I see.

MR. SISKIN: I have no further questions, your Honor, of the witness.

JUDGE ROSE: Mr. Appell.

MR. APPELL: Yes.

CROSS-EXAMINATION

BY MR. APPELL:

Q Mr. Chakofsky, did you have any employees at all in June of 1967?

A In June of 1967?

Q Yes.

A No.

Q And did you --

A Excuse me.

Q Yes.

A My father-in-law worked for me one day a week as a clerk in the front.

what this picketing was all about?

A Yes.

Q And whom did you speak with?

A Harold Laskowitz.

Q When would that have been?

A After I took over the shop, he had -- Harold Laskowitz and Harold Lazar -- witnesses from the Teamsters -- were down to see me.

The Teamsters came in first. They wanted to put a driver in my shop.

I explained to them and I showed them that it wasn't wholesale. They said around a while. They were watching me 24 hours a day. They saw there were no deliveries, no trucks, strictly retail store. They walked away.

That was the end of them.

Q Did Laskowitz talk to you at all?

A Yes.

Q What did he say?

A He came in and he told me that he would give me six months to build a route for wholesale.

I said, "Well, you know, I'll try, you know, if there's anything around."

But there was nothing around for the wholesale at all. That's when they started picketing me. They picketed me for about a year, I guess, and then they walked away.

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(Handing.)

A There is no date -- the only date here is the 20th day of April, 1967.

Q That's the document with your signature on it; right?

A Yes.

Not this particular page, of course.

Q No.

The last page of that document bears your signature?

A Right.

Q And the signature of your partner?

A Right, and Oscar Stern.

Q And Oscar Stern as president of Neptune Bagel Bakers?

A Right.

Q Now, looking at that document, will you please tell the Judge how many weeks or how many months prior to that date you started negotiationing with Mr. Stern for the purchase of Neptune Bagel Bakers?

A Oh, I don't remember that. I don't know whether it was a week or ten days or a month. I have no idea on that.

I mean, I -- this is the date -- I assume this is the date that I did purchase it.

When we purchased it, we had to go inside and work on it because it was not in any condition to open up. We opened up some time in June, I believe, you know, for business.

What day I actually went to Oscar Stern and asked him if he wanted to sell the bakery, I have no idea. I don't remember that.

Q Are you aware that --

A Well, we are going back 10 years now. I don't remember, I really don't.

Q Are you aware that one week after this was signed, six days later, there was a closing at which you and your partner attended?

A After this was signed; right?

Q Yes.

A It's very possible, yes.

Q As a matter of fact, Mr. Chakofsky, Stern's Exhibit 2 is a bill of sale.

(Handing.)

A Right.

Q That bill of sale was executed on the date of the cllsing, April 26, 1967.

A In other words, a certain number of days between this and this; right?

Is that what you're saying?

Q That's what the documents say. You tell us.

A That's what it says. I don't recall exactly.

Q Look at the second --

A I'm not disputing these documents.

Q Look at the second document.

A Yes.

Q The second document is signed between two corporations, is it not?

So that by April --

A This is signed by Oscar Stern.

Q Look at the first page --

A And this is signed by --

Q Look at the parties on the first page.

A Neptune-Brighton Bagels, Inc.

Q So that by that time you were incorporated, weren't you?

A On that date. I guess I was. I don't know.

What date is that? Can you help me?

Q Take a look at the second page.

A April of 1967. Yes, then that's the date.

Q Now, when you purchased Neptune Bagel Bakers, you purchased a truck in the sum of $1,000, didn't you?

A Yes.

Q Did you --

A As I told you before, that was part of the agreement to buy the bakery, I had to buy the truck, too.

Q You had a lease with Mr. Oscar Stern?

A Yes.

Q Where did you send the leases -- where did you send the checks to for the rent under the lease?

A While Oscar Stern lived in Brooklyn, he came down himself and picked it up.

When he moved to Florida, it was mailed directly to him in Florida.

Two or three months ago he transferred the property, his assets, I guess, to his son in California. That's where I mail the checks now to.

Q Take a look at the top of Page 2, the closing statement, the day of the sale.

A Right here (indicating)?

Q Yes.

Oscar Stern as the landlord individually --

A Right.

Q -- under the lease, wasn't he?

A Yes.

Q I'm talking about the major lease that you paid rent under.

A Well, he owns the building.

Q Right.

A Right. I don't dispute that.

Q And when you were presented with a closing statement, who presented you with it?

Which attorney presented you with it?

A Well --

Q In other words, who prepared the closing statement for the parties?

A Philip Levine.

MR. SISKIN: I'd like to voir dire on that.

JUDGE ROSE: Well, we will wait until it is marked and offered.

MR. KRAMER: Would you please mark this as Stern's Exhibit 3 for Identification.

(The document above-referred to was marked Stern's Exhibit 3 for Identification.)

BY MR. KRAMER:

Q By the way, Mr. Chakofsky, do you remember how much you paid for the business?

A I think $35,000.

Q In addition to the $5,000 in good will, do you know what the rest of the -- do you know what the balance was, the $30,000?

A No, no.

Q Do you remember at the closing that there were certain documents signed?

A Yes.

Q A bill of sale?

A Notes.

Q That is, a bill of sale for the truck?

A I don't recall. I do know I did buy the truck.

the union, I have no knowledge of that.

Q You're saying that you had no knowledge at the time you purchased the business that some employers in the Council had told men not to come to work?

You didn't know that at that time?

A No, no, I didn't.

I worked in one bakery, worked for Hempstead Bagels. There was no problem over there, as far as I know, until Mr. Laskowitz told me not to come into work.

Q Did you -- when you worked for Flatlands, did you work for Flatlands up until the time of the lockout?

A Until the delegate told me not to come in any more.

Q And did anyone from Flatlands tell you not to come in to work?

A No, no.

I didn't have any dealings with the boss, only had dealings with the union.

MR. APPELL: No further questions.

MR. SISKIN: No further questions.

JUDGE ROSE: Mr. Kramer:

MR. KRAMER: Yes.

RECROSS-EXAMINATION

BY MR. KRAMER:

Q You said when you purchased Neptune Bakeries, it was empty; is that correct?

A I said it was shut, shut down, closed.

Q Shut down?

A It was closed. The store was locked. It was not operating.

Q During your discussions with Oscar Stern, did you and your partner discuss why it was empty?

A No, no.

Q In your own mind, the only thing you were getting was the premises?

A Right.

Q Is that it?

A Right.

Q Did you know how long it had been empty?

A About four months, approximately.

MR. KRAMER: No further questions.

MR. SISKIN: One second.

Here, you can keep this.

(Handing.)

JUDGE ROSE: Anything further of this witness?

MR. KRAMER: I was just given a document.

MR. SISKIN: Yes, your Honor. This is the notice to amend.

One of the defenses in there has some relevancy to Mr. Kramer's client. I just wanted him to be advised of it.

MR. KRAMER: Thank you, Mr. Siskin.

MR. SISKIN: You can keep it.

JUDGE ROSE: Anything further of this witness?

MR. KRAMER: No further questions.

MR. SISKIN: No further questions.

MR. APPELL: No further questions.

MR. APPELL: Nothing, your Honor.

JUDGE ROSE: Okay.

You may step down.

Thank you.

(Witness excused.)

JUDGE ROSE: Off the record.

(Discussion off the record.)

JUDGE ROSE: Back on the record.

Whereupon,

BERNARD TEITELBAUM

C.P.A., 108 South Franklin Avenue, Valley Stream, New York, called as a witness, having been first duly sworn by Judge Rose, testified as follows:

DIRECT EXAMINATION

BY MR. SISKIN:

Q Mr. Teitelbaum, how long have you been a certified public accountant?

A Since about 1951.

Q And prior to that time, did you obtain a degree in accounting?

A Business administration.

Q From which school?

A The College of the City of New York.

Q And had there ever been a time when you were employed as a bagel baker?

A Yes.

Q And how many years were you employed as a bagel baker?

A From about 1951 til the early 60's, I would guess, about '62 or three. I was a card-carrying member of Local 338.

I was a member of the exeutive board and I was a member of the negotiations committee.

Q And how many years in total, Mr. Teitelbaum, were you employed as a bagel baker?

A About 10 or 12 years, I would guess.

Q Did you ever operate a shop?

A There was a shop that had been left when my father-in-law died and my mother-in-law was the owner.

We operated it for her every summer. It was the Monticello Bakery.

Q And did there come a time when you obtained certain -- or you ordered that certain clients in the bagel bakery in the business --

A Yes, starting about 1967.

Q Can you give us the names of those clients?

A Pop's Bagels in about 1957, Neptune Bagels in about '57 and Golden Bagels somewhere around '70, except we had to catch up a couple of back years.

Q And did there come a time when you prepared tax returns for these concerns and you prepared the books or original entry -- or you prepared the general ledgers, so to speak, for those years?

A We prepared general ledgers, or their equivalents, and we prepared the tax returns as required by the Internal Revenue Code.

Q And did there come a time when you, pursuant to request in this proceeding, had to prepare a financial exhibit which incorporated certain financial highlights?

A Do you want to repeat that?

Q Yes.

Did there come a time when you prepared a summary listing on exhibit of certain costs and sales data --

A Yes.

Q -- to be used in connection with this proceeding?

A Yes.

Q Where did you obtain the information from of that exhibit?

A The information came from the books of original entry, from my own work papers and from retained copies of tax returns.

Q And did that financial exhibit that you have here today evolve from your own source data contained in your own ledgers?

A Yes.

Q And did it reflect certain computations which were normal and routine, according to accounting usage in the accounting profession?

A Yes.

Q Is that correct?

A Yes, that's correct.

Q Do you have that exhibit here with you today?

A Yes, I do.

Q And is it for each particular client?

A Right.

JUDGE ROSE: Those exhibits will be, respectfully, 53, 54 and 55.

(The documents above-referred to were marked as Respondent's Exhibits 54, 54 and 55 for Identification.)

BY MR. SISKIN:

Q And in these exhibits, did you isolate the pure bagel sales?

A Yes.

Q Based upon your own analysis of your own financial data?

A That's correct.

Q And did you isolate the bagel ingredient purchases for these companies?

A That's correct.

Q And did you also record therein the net profits and/or losses for the concerns for these periods of time?

A Yes, I have.

MR. SISKIN: Let me ask that these be marked in evidence.

JUDGE ROSE: Any objections?

MR. APPELL: No objection.

JUDGE ROSE: Very well.

Exhibits 53, 54 and 55 are received into evidence, at this time.

(Documents, heretofore marked Respondent's Exhibits 53, 54 and 55 were received in evidence.)

BY MR. SISKIN:

Q Now, with respect to Neptune, is it fair to say that your first year is as a short year for Neptune Bagels, the year of 1967?

A That's correct.

Q Approximately eight months?

A May, June -- yes, about eight months and a couple of days.

Q Whereas, the other years, '68 and '69, are full years?

A All full years, yes.

Q And in these exhibits, did you reflect total purchases including flour and then isolate the flour?

A Essentially that was the system used.

Q That's the procedure that you utilized?

A Right.

In some cases our records indicate flour purchases per se, so we didn't have to go through that breakdown.

Q Okay.

And is it fair to say that as a matter of accounting usage and principle, that bagel labor and bagel purchases would flow in some sort of ratio to bagel sales?

A Yes, I would say so.

Q And is that true as a matter of fact in most industries, that the direct costs would flow according to the sales?

MR. APPELL: Objection.

JUDGE ROSE: Sustained.

MR. SISKIN: All right.

BY MR. SISKIN:

Q Now, will you tell us what the Neptune Bagels Exhibit reflects as far as your bagel labor or presumed bagel sales dats would reflect, in some sort of correlation?

A In Neptune, all of the labor indicated here -- as as a matter of fact, none of it is actually bagel labor.

There were two principals over there and there was no payroll because that was a partnership. They chose not to indicate a payroll for themselves.

There is actually no relationship in Neptune, that is, between bagel labor and bagel sales.

There is a direct relationship, however, between bagel ingredients purchased and bagel sales.

Q And did you note in your maintenance of records that all sales were to retail or was there no differentiation?

A There was no differentiation made because there were just no necessity for everything -- everything that came in over the register with actually what their sales were, for practical purposes.

Q So is it fair to say --

A There were no accounts receivable ledgers and no wholesale sales.

There were no provisions made for them on the books of account.

Q and in these partnerships, is it also fair to say in partnerships, partners' drawings or salaries are reflected as drawings and not as a salary?

A That's correct.

They -- it's pretty much optional, but we chose not indicate partner salary as such.

Whatever was left at the bottom of the return at te end of the year is what the partners have.

Q And that's reflected both salary and/or profit or loss?

A Salary and/or profit.

Q Now, with respect to Golden Bagel, did you make the same sort of exhibit?

A The same type of analysis was made.

Q And with respect to Pop's Bagels, did you make that same analysis?

A Exactly the same type of analysis.

Q Now, would you tell us what conclusions you can draw with respect to each company, with respect to the direct bagel labor that would have flowed in those financial statements with respect to the years involved?

A Yes,. going -- well, going back to 1966, when the payroll was at a piece work rate, it's very easy to come up with a relationship between payroll and gross sales.

And so that for practical purposes, assuming that the price of bagel remained essentially the same and that the payroll remained essentially -- and that the payroll rate remained essentially the same, we would have to assume that a bagel went down from '66 to '67, went down by $88,000, which is somewhere under 30 per cent.

So I would assume that the least that would happen would be that payroll went down by that similar number. But to make the situation even more serious, in the years when there was wholesale sales, the wholesale price would reflect a given number of units.

As we go further into '67, '68 and '69, where the wholesale falls away, the same number of dollars would reflect a lesser number of units because we have a higher per unit cost.

And since it is a per unit payroll, consequently your number of units produced would have gone donw.

Q Is that because of the method of production and payment that was in vogue in the industry?

A That's correct.

It was --

MR. APPELL: Objection.

JUDGE ROSE: Sustained.

BY MR. SISKIN:

Q Is that because that's the method of payment that was evolved in these respective shops?

MR. APPELL: Objection.

JUDGE ROSE: Mr. Siskin, just ask him why it was, if he knows.

MR. SISKIN: Yes, sir.

BY MR. SISKIN:

Q Can you tell us, sir, based upon your analysis, what the reason for that correlation was?

A Well, it was a very simple thing.

Piece work payroll is tied directly to the number of units produced.

You produce more units, you have more payroll; less units, less payroll. And in this case, sir, there were a lot less units, and consequently a lot less payroll would have been earned.

Q Addressing yourself to each company, can you be specific?

A Pop's Bagels, for example, in 1966, had $228,000 worth of bsales.

In 1967, they had $104,000 worth of bagel sales, or a drop of $124,000.

That would have resulted in a drop of 54 per cent in sales. That is assuming that the unit price was the same, which I maintain is not necessarily correct.

If anything, the unit price was higher, which would have meant a lower number of units produced.

But assuming this is the case, the maximum that Pop's payroll could have been in 1967 would have been 54 per cent times $109,000, roughly, or roughly fifty-nine thousand some-odd dollars.

Q And how about 1968?

A In 1968, the drop was even more marked.

In 1968, the drop was $147,000 or a drop of 64 per cent, which means that here again the drop in payroll would have been about $70,000 from that $109,000 or $110,000 in 1966, that 1966 figure.

Q Now, how did the minimum box cost play a part in this cost unit computation?

A Well, in 1966, I would assume, for the most part, that the minimum didn't affect it at all.

In 1967, in times when the union was in the minimum, required 100 boxes be paid for regardless of production.

So that there were times when payroll had no relationship to sales, because you could produce 20 or 30 boxes and still pay for a hundred.

Q And how about in 1968?

A If there were union people in at that time, that same thing held true.

Q Now, would you give us the same analysis with respect to the other two companies?

A Well, in Golden Bagels, from the year 8/31/66, where we had $196,000 to where he went to -- I'm sorry -- to $57,000 in the next year, we came up with $129,000 drop.

$129,000 over $196,000 meant that we dropped 65.8 per cent.

The payroll, which in the year ended 8/31/66 was $37,000, would have gone down by some $24,000. Here again, just looking at these figures and not having looked at them for a while, it would seem to me that they were a prime candidate for being hurt by the per box, or the minimum 100 box ruling.

Q And how about '68?

A the '68 is the one that I just gave you.

Q How about '67?

A In '67, their drop was $98,000, or roughly 50 per cent, which meant that their payroll would have dropped from thirty-seven in 1966 to about 18 1/2 in '67.

Q And how about the third corporation?

A No, the third corporation was Neptune Bagels. Here I have nothing in the '66 year. We merely have the direct relationship in the cases of sales of bagels and purchases of bagels.

We have about 25 per cent in the '67 year. we have --

Q That's drops?

A No, no.

This is the relationship of purchases to sales.

Q That's purchases of bakery ingredients?

A Yes.

In '68, the ration was roughly 19 per cent and in '69, it went back up to 27 per cent.

In this -- in this instance we have no relationship at all. There is no way we can tell what the labor relationship would be simply because the only individuals who performed or who produced the labor were the two partners.

They are not indicated in the payroll anywhere. Whatever is left is theirs. That's the nature of a partnership tax return.

MR. SISKIN: I have no further questions of the witness at this time.

JUDGE ROSE: Cross-examination.

CROSS-EXAMINATION

BY MR. APPELL:

Q Mr. Teitelbaum, with respect to Golden Bagels, what is the source of your data here for each of these years?

A The source of my data for '66, '67 and '68 are returns or statements prepared by another accountant, the accountant who previously had the account.

These are returns which I assume were filed with the Internal Revenue Service.

Q And the final year is on the basis of the records themselves?

A Based on the records themselves and my work papers.

Q With respect to the Exhibit No. 54, the Pop's, in which the basis of your -- what's the basis of your information there?

A '66 was based on a return prepared by another accountant.

'67, '68 and '69 are based on returns prepared by me or my office from my work papers, from the books of original entry as prepared by the client or the client's bookkeeper and from general ledger.

Q Well, which did you actually see the original books on, what years?

A '67, '68 and '69.

Q And how about now for Neptune-Brighton?

A All records were from books of original entry, my work papers and tax returns, as prepared by me or my office.

Q Do you have records for Golden from '65 here?

A No, I do not.

Q Do you have -- know if any exist?

A I do not.

Q Pop's Bagels, do you have any records from '65 here?

A I do not.

Q Do you know if they exist?

A They may.

Q What's the difference between an entry, consumed purchases bagel intredients and simply purchase of bagel ingredients?

A Essentially the same. The difference is that I had only a given amount of time to write.

Q Do you have any reason to believe that the trend of the figures would be any different had you figured them all in one manner?

A They are all figured in one manner.

Q I mean with the difference --

A It's the heading essentially which is different.

Q I see.

The figures are the same?

A Right.

The same tests were done -- the same things were done to all of the numbers.

MR. APPELL: I have no further questions, your Honor.

I would renew my request for underlying records for theee companies.

MR. SISKIN: We have some of those records here today.

If you want to take a look at them -- we have the general ledgers, so you're welcome to look at them.

MR. APPELL: Well, I'm particularly interested, your Honor, in the year 1965 at this point.

JUDGE ROSE: What's the relevance to the year 1965?

MR. APPELL: To see what the trend was.

Were things similarly as bad in '65 and yet nonetheless

(Discussion off the record.)

JUDGE ROSE: Back on the record.

MR. APPELL: May we just have a minute, your Honor?

JUDGE APPELLA: Yes.

Let's proceed, gentlemen.

Whereupon,

SIDNEY LEVY,

having been previously sworn by the Administrative Law Judge, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. APPELL:

Q Mr. Levy, with respect to General Counsel's Exhibit 1-N, which is in evidence, the amendment to backpay specification, who prepared that specification, that amendment?

A I prepared it.

Q Can you explain how you -- how and why you set these items out?

Let's start with Paragraph 1 and 2.

A Yes.

MR. SISKIN: Your Honor, objection.

I just want the record to show that I must renew my objection at this time for the late introduction of this amendment, and more particularly I must renew my objection because I'm put in the peculiar position of having to defend against something that I haven't even answered yet.

To me, your Honor, that's very peculiar. And so at this particular point I would want the record to show that I'm renewing my objection again.

I think I'm being denied due process.

I want the record to show that specifically, that specific objection.

Okay.

JUDGE ROSE: Overruled.

Go ahead.

A (Continuing) This amendment to the backpay specification with respect to vacation and holiday pay is premised or predicated on the proposition that the contract between Respondent-Employers and Bagel Bakers Union 338 required payment by the employers into a vacation and holiday fund.

According to Paragraph 20 of the 1966-67 Agreement, payment was made by the employers, or was required to be made by the employers, into the fund at the rate of eight and a half cents per box of bagels.

I believe the same requirement existed in the immediately preceding contract.

MR. SISKIN: Objection, your Honor.

A (Continuing) The --

MR. SISKIN: Objection.

JUDGE ROSE: Sustained.

MR. APPELL: As to what part, your Honor?

MR. SISKIN: I'm objecting to the entire sentence.

Your Honor, there has been no evidence introduced that there was such an agreement.

If there is one, let that be the best evidence and let that be produced.

JUDGE ROSE: That's correct.

Is the contract in evidence?

Is there a contract?

Is there a contract to be put into evidence, Mr. Appell?

MR. APPELL: Your Honor,there is reference to contracts in the Board decision.

I don't know that the actual contract has been introduced here.

MR. SISKIN: Your Honor, I might add on the record that we don't have any such agreement at all, your Honor, in our files, never idd.

BY MR. APPELL:

Q Mr. Levy, do you know if you have any such agreement in your file?

A In my files is a copy of a document entitled, in substance, the 1966-67 Agreement.

Q And what's the -- do you know where you got that document from?

JUDGE ROSE: Just a minute.

Respondent's Exhibit 6 appears to be the contract.

MR. APPELL: Let me see.

JUDGE ROSE: Which is in evidence.

Can you find that?

MR. APPELL: Yes.

MR. SISKIN: May I see that for a minute, please?

MR. APPELL: Here (handing).

MR. SISKIN: This is a dispute here, there most definitely is.

It's the position of -- as I understand it, it's the position of my --

JUDGE ROSE: Just a minute.

Where are we?

What's going on here?

There has been an objection to Mr. Levy's testifying from memory.

MR. SISKIN: Yes.

JUDGE ROSE: As not being the best evidence.

I sustained that objection.

The document is, however, in evidence.

MR. SISKIN: Yes.

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Your Honor -- if you want to go off the record, we can go off the record.

JUDGE ROSE: That's all right.

MR. SISKIN: Okay, on the record.

It is the contention of the respondents, your Honor, those of the respondents who are here today, advise me that nothing in this agreement applied during the year 1967.

The contention of the -- 1967 and 1968.

The contention of the NLRB has been that this agreement, according to the amendment of the backpay specification, covered 1966 and 1967 and apparently 1968.

JUDGE ROSE: Very well.

Proceed, Mr. Appell.

BY MR. APPELL:

Q Mr. Levy, can you explain the grounds for Paragraph 4?

A Yes.

The premise of this amendment is that the rules with respect to holiday and vacation fund contributions, which were in fact operative during the year 1966 and at least up to February 1, 1967, when the lockout occurred, continued as a matter of law to be operative and controlling during the backpay period, namely, from February 1, 1967 through September 1968 when the rules were changed as a consequence of collective bargaining between the parties.

But that until those rules were changed and in consequence of the respondent's unfair labor practices, the rules prevailing prior to February 1, 1967 continued to be operative and controlling during the backpay period.

MR. SISKIN: Objection, your Honor.

JUDGE ROSE: Just a minute.

Yes, Mr. Siskin.

MR. SISKIN: My objection is with respect to the premise -- to the legal effect.

I think this witness has testified as to legal effect.

JUDGE ROSE: Right.

Mr. Siskin, I am not accepting a word that Mr. Levy is testifying to as true.

All I am accepting is that this is the premise upon which he calculated General Counsel's Exhibit 1.

That doesn't mean that I am going to accept that premise to be in fact the law of this case.

MR. SISKIN: Okay. Thank you, your Honor.

BY MR. APPELL:

Q Mr. Levy, did you finish your answer?

A I think I was about to say that, accordingly, relying on the premise which I stated previously, Paragraph 4 projects into the backpay period the rate of disbursement by the vacation and holiday fund as it occurred in 1966 into the backpay period.

That's the meaining,in effect, of Paragraph 4 of the amendment.

Q   Can you explain, with respect to Paragraph 6 on Page 2, the kettleman -- your basis for your kettleman rates there.

A   Paragraph 6?

Q   Yes.

A   That Paragraph is based upon the rates paid by the fund to kettlemen, as evidenced by W-2's in the NLRB -- in the NLRB files and/or the W-2's placed in evidence for various kettlemen who testified in the proceeding.

MR. SISKIN: Your Honor?

JUDGE ROSE: Yes, Mr. Siskin.

MR. SISKIN: Okay.

I just want to clarify in my own mind my rights under your rulings, past and present,to cross-examine any of the claims by this appendix, that are listed in this appendix, with respect to --

JUDGE ROSE: Well, as a matter of fact, Mr. Siskin, you have cross-examined the claims listed in this appendix on this very subject, because Mr. Appell did indicate early on in this hearing that he was going to amend his complaint to bring forth this particular matter.

My recollection is that after the first three or four of the claimants testified, then there was testimony on this point and you did cross-examine.

MR. SISKIN: My recollection is, your Honor, I think there may have been as many as 15 or 20 that testified before I cross-examined them.

JUDGE ROSE: No, that's not correct, Mr. Siskin!

As to those claimants, however, whom you did not have an opportunity to cross-examine because it was not brought forth by Mr. Appell, you would have -- you should have a right to cross-examine them.

How we are going to be able to work that out, I don't know at this point.

MR. APPELL: Your Honor, I would like to ask at this time whether counsel for respondents has a serious question as to whether the claimants in this case actually received the amounts that have been testified to already across the board?

Is there really a serious issue as to whether each of these people received this amount in light of the record testimony and documentary evidence that's been put in?

MR. SISKIN: I can't answer that, your Honor, simply because the cutoff dates in 1966 were not necessarily the same -- in 1967, rather, -- were not necessarily the same for my various respondents in this case, as I understand it.

I don't know whether that's also the case for 1968, as well, too, so I can't answer that at the present time.

MR. APPELL: Your Honor, where the cutoff dates --

JUDGE ROSE: Excuse me, Mr. Appell.

That's really not the question he's asking you.

The question is whether there is any serious question but what all of the respondents paid into a vacation and holiday fund in 1966 and that this was in fact distributed to the employees.

MR. SISKIN: For the year 1966?

JUDGE ROSE: Yes.

MR. SISKIN: I don't think that there's any question of that for the year of 1966.

Limiting that to 1966, yes, your Honor, absolutely.

JUDGE ROSE: I'll receive that stipulation.

MR. APPELL: Then the question would be, your Honor, if there's any question but that they received the amounts that people have testified to in this hearing with respect to 1967.

MR. SISKIN: Yes, your Honor, there's a serious question.

In the first instance, as I understand it, the computation does not necessarily parallel what the individuals received from this or any other fund.

As I understand it, your Honor, these amounts don't necessarily tie in or reconcile to the amounts that the individuals could receive in a given year.

There are differences.

How substantial that contention is, I can't answer that now, your Honor, only because I don't have all of my respondents in here.

But I could come to that further stipulation at a later time in this hearing, your Honor.

JUDGE ROSE: Very well.

Let's see what we can work out in that respect.

MR. APPELL: I have no further questions of this witness, your Honor.

JUDGE ROSE: Any questions, Mr. Siskin?

MR. SISKIN: Yes.

CROSS-EXAMINATION

BY MR. SISKIN:

Q Mr. Levy, in the course of your computations, did you make reference to any other actual union agreements that were negotiated during the year 1967, in that year, with third parties or with any of the respondents?

A I don't know quite what you mean by make reference to, but I am aware of subsequent contracts in which the method of making vacation and holiday pay was changed to a system of paying three and a half dollars per man per day.

Q Do you have any of those subsequent contracts in your files?

A I would have to look. I may have a copy of the 1968

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Bagel Bakers' contract.

Q Well, isn't it a fact -- isn't it a fact that there were 1967 agreements that were signed, which reflected a complete change in the method of vacation and holiday pay, with other members in the industry?

A I have been so informed and personally believe, assume that to be the case.

Q Well, who informed you of that?

A At this stage of the game, Mr. Siskin, I don't know.

It may have beem employers, employees.

Q Would your notes reflect that?

Will your work papers reflect that consideration?

A I --

Q That comment or that acknowledgement?

A I doubt it.

MR. APPELL: I object to that question, your Honor.

JUDGE ROSE: What's that?

MR. APPELL: I object to that question.

JUDGE ROSE: What's the question?

MR. SISKIN: Wouldhis notes or work papers reflect that consideration that there have been contracts executed which change the manner of computation.

JUDGE ROSE: Well, Mr. Siskin, he's testified that the assumption of general Counsel's Exhibit 1 is that the method of the computatio was the same in 1967 and in 1966.

MR. SISKIN: Yes.

JUDGE ROSE: He did not take into consideration any other.

MR. SISKIN: Yes.

However, I've already elicited from this witness, your Honor, that he knew for the years 1967 and 1968 that there had been agreements which reflected that change.

JUDGE ROSE: That's right.

MR. SISKIN: And I'm going to question it, your Honor, as to why he chose one method or another.

JUDGE ROSE: Ask him why he chose one method over another.

MR. SISKIN: Yes.

BY MR. SISKIN:

Q Can you tell us, Mr. Levy, in view of what you just testified to, why you chose the premise that you did choose over the fact that agreements were executed in 1967 and in 1968 which changed the method of computation?

A Yes.

There are several considerations.

One, it should be borne in mind that the interim earnings admitted to by the General Counsel in the basic backpay specification, the interim earnings in 1967 and in 1968 during the backpay period, reflect the payment directly to the backpay claimants of vacation, holiday pay at the rate of three and a half dollars per day.

As originally prepared, and absent this amendment, the vacation and holiday pay was not reflected in the gross backpay computation set forth in the various appendices.

Now, the purpose of this amendment is to include an appropriate figure, or value, for vacation and holiday pay during the backpay period due or attributable on the General Counsel's theory to the respondent-employers.

Now, the reason -- to get to come down to directly, I think, to your question, is, why did we premise the further amount due from respondents on the basis of payments into the fund rather than the three and a half dollars a day system, is simply the -- is simply the legal -- is simply the proposition which I stated in the outset of my testimony at this time that in view of the fact -- that in view of the unfair labor practices found by the Board in the underlying -- in the underlying case, it is our view that the eight and a half cents per box contribution to the fund continued as a matter of law throughout the backpay period until replaced by the three and a half dollars a day system, as between the respondents and the union.

To assume otherwise, namely, that the three and a half dollars a day system which the union entered into with various other employers is something that the respondent-employers were entitled to at an earlier date, would, in our view, undercut the order and the remedy of the Board.

I say this in view of the unfair labor practices which were not resolved until consumation of the 1968 contract.

Q Well, isn't it a fact, Mr. Levy, that what actually transpired in 1967 and 1968 was that the individuals that did work did get the three and a half dollars per day, or whatever the kettlemen amount was, in lieu of and in place of the amount that had been in the original collective bargaining agreement?

A Yes, they did.

Q And isn't it a fact that they would have goteen only one of those three and a half, or whatever the amount was that the kettlemen got, per day, and that if they did so work they were made whole for that particular day under the revised agreement?

Isn't that correct?

A Well, they would -- I would say that they were not made whole to the extent -- in our specification they're not made whole to the extent that there was no provision in the original gross backpay computation for payment, in whatever form, for vacations and holidays.

However, the three and a half dollar per day payment by other employers for whom they have worked during the backpay period was reflected, is reflected in the in the interim earnings figures set forth in the backpay specification.

Q Well, isn't it a fact that Flatlands Bagels settled, in 1967, with the union; and isn't it a fact that they entered --

MR. APPELL: I object to more than one question at a time.

JUDGE ROSE: Excuse me?

BY MR. SISKIN:

Q Isn't it a fact that -

A Yes, I agree that --

MR. SISKIN: I'll rephrase it to limit it to that.

A Yes, I agree that Flatlands settled in June 1967.

Q And isn't it a fact that when they did settle, they antered into the revision so as to make it $3.50?

A That is my understanding.

Q Do you have a copy of the agreement that they executed, here today?

A I don't think I do.

Q Would it refresh your recollection if you did take a look at an agreement that was similar to the one they executed?

A Well, I've said it's my understanding that Flatlands Bagels did conclude a contract in June of 1967 with the union and that it reflects the three and a half dollars per day cash payment for vacation and holiday benefits.

And in this -- and in the computations that go with this amendment, in the case of two of the claimants who have monies due from Flatlands alone, that is taken into account.

They are -- Flatlands is charged with only 39 per cent of the amount otherwise found due.

The 39 per cent is the approximate period between February 1 and June 15, 1967.

Q Isn't it also true, Mr. Levy, that for non-union members, that same contribution was made of $3.50 for the year 1967?

A I believe that to be the case, although I do not have any knowledge as to the particular dates when the $3.50 system came into operation, with respect to any employer other than Flatlands.

Q Did you compensate for that fact anywhere in your adjustments?

Did you adjust your numbers for that fact that non-union members, as you stated you believe, did receive the benefit of the $3,50 daily rate?

a Well, it is -- it's my position that to the extent that these three and a half dollar payments were made by other employers, non-union employers, that those monies are in fact reflected in the interim earnings admitted by the General Counsel in the basic backpay specification.

The original backpay specification, I'm sorry to say, was defective in that it did not have a compensating or offsetting amount for vacation and holiday pay in the gross backpay figures set forth.

Q And is it fair to say that when you made this amendment to the backpay specification, you premised it on a computation based upon eight and a half cents for each box of bagels produced?

A Well, it's sort of yes and no.

Q But limiting yourself to what One says in your amendment and to what you have heretofore testified this afternoon , isn't the answer yes?

A Not the way you've put the question to me, Mr. Siskin.

Q Then I'll rephrase the question.

A Paragraph -- if I may complete my answer?

Q No.

I'll withdraw the question. I'll rephrase the question.

Isn't it a fact, Mr. Levy, that your premise was that the agreement between the respondents and Bagel Bakers' Union, Local 338, was applied in this determination at the rate of eight and a half cents for each box of bagels produced?

If you read what One said in view of your testimony.

A No.

What one says, I think quite clearly, is that Paragraph 20 of the agreement obligates the respondents to make contributions at the rate of eight and a half cents per box of bagels.

I have no information, for example, on how many boxes of bagels were actually produced.

Q Well, wouldn't you have to have that information, Mr. Levy, to arrive at the implementation of the 1966 agreement for any given year?

A No, because the premises on which these calculations are based are set forth in this amendment and in my testimony here this afternoon, which I can repeat.

Q Well, isn't it a fact that the method that was used in 1966, Mr. Levy, was at the rate of eight and ahalf cents for each box of bagels produced?

A Correct.

Q And isn't it a fact, Mr. Levy, also, that you patterened this amendment after 1966, after the 1966 agreement?

A Correct.

Q And if you were to compare eggs with eggs and apples with apples, wouldn't you have to compute the benefits determined upon the boxes of bagels produced?

A No.

I have premised the amendment and the computations on the proposition that monies came into the fund pursuant to the contractual obligation, two, that monies were dispersed from the fund in 1966 in the amounts set out in the amendment; and three, that absent the unfair labor practice, monies would have been dispersed in the backpay period at the same rate which prevailed in the period prior to the unfair labor practices.

Q Well, Mr. Levy, if you were to arrive at a determination based upon that agreement, wouldn't you have to have the number of boxes produced to arrive at such a determination?

Yes or no, Mr. Levy.

A No.

Q Well, how could you implement that agreement, which itself is based upon a rate per box, without determining what boxes go into your formula?

What input goes into your determination?

A First of all, there isn't a necessary and inevitable coincidence between the amount of money paid into the fund and the amount of money dispersed.

Two, the premise here is simply that the amount dispersed in 1966 would have been the amount dispersed in the backpay period, absent the unfair labor practices involved.

I have nothing beyond or behind that premise or proposition.

Q But, Mr. Levy, in coming to the determination that you did come to, didn't you, in effect, disregard the consideration of the number of boxes produced?

Yes or no, sir?

A I did not take it -- I did not take the number of boxes produced into account, that's correct.

Q And isn't that what that agreement said had to be done?

A Well, I don't agree with that version, Mr. Siskin.

Q Well, sir, did you ascertain for the year 1966 whether the eight and a half cents formula was implemented?

A I made no independent determination, no.

Q So, are you now -- so, is it now your testimony, Mr. Levy, that you don't know whether the 1966 agreement did in fact have an eight and a half cents formula for each box of bagels, which was followed by management?

A Well, only the -- I would agree with only the last phrase of your question, which I believe I answered before.

I have not made any independent determination as to how many boxes of bagels were produced in 1966 or whether the respondent-employers adhered to or did not adhere to, in whole or in part, with the requirement of Paragraph 20.

Q So, is it fair to say, sir, that to the extent that you did disregard the eight and a half cents for each box of bagels produced in your determination for 1967 and 1968, you, in effect, made a new formula for determining backpay, according to such agreement?

Is that correct?

A Well, I can't agree with your evaluation, no.

Q Well, Mr. Levy, didn't you ignore the eight and a half cents formula for 1967 and 1968?

You didn't account for volume at all in your formula, did you?

MR. APPELL: I object.

JUDGE ROSE: Overruled this time.

But he's answered that a number of times, Mr. Siskin.

MR. SISKIN: Well, I won't proceed any further after I get --

JUDGE ROSE: You did not consider the number of boxes produced, did you?

THE WITNESS: Correct.

JUDGE ROSE: Go on, Mr. Siskin.

BY MR. SISKIN:

Q Now, did you make any effort to obtain any information as to the number of boxes produced for the year 1966, 1967, or 1968?

A No.

Q Do you know whether the number of boxes varied from 1966, 1967 and 1968, as you've heard in the testimony during this trial?

A I have no independent knowledge.

Q Was there ever a time, Mr. Levy, when such information was furnished you by the union or otherwise, with respect to the number of boses --

A No.

Q -- produced in 1966, 1967 and in 1968?

A No.

Q Well, did you know whether the union auditied any of the companies for the year 1966, with respect to the implementation of this formula?

A I had been given to understand that in at least one instance the union, through an auditor, examined the books of one respondent, and the auditor allegedly reported that the records were not accurate and that proper payment was not being made.

Q Do you know whether the union ever maintained production records for the years 1966, 1967 or 1968, in terms of boxes?

A I have no knowledge except what I may have heard in this hearing as to what production records the union maintained.

Q Did you ever see any of the transmittal forms --

JUDGE ROSE: Mr. Siskin, what's this all about?

MR. SISKIN: This has to do, your Honor, with the comparison between the volumes for 1966, 1967 and 1968.

JUDGE ROSE: Let me say at this point that I totally agree with your theory at this point.

I do not think this testimony goes to that.

Mr. Levy has already testified that he did not take into consideration any production in 1967 or 1968, in arriving at this specification.

So whether he knows about it or not, it doesn't make any difference.

Let me ask you this, Mr. Levy:

Is not your assumption here that but for the unfair labor practices each of these respondents would have had the same production in 1967 as they would have had in 1966?

THE WITNESS: Yes,that's essentially the case.

JUDGE ROSE: That's essentially your assumption?

THE WITNESS: Correct.

JUDGE ROSE: And, therefore, the contract would have applied in the same way, and thus the same amount of money would have been forthcoming from the respondents to the union to be distributed to the employees?

THE WITNESS: That is correct.

JUDGE ROSE: Proceed, Mr. Siskin.

BY MR. SISKIN:

Q Now, Mr. Levy, did you maintain any work papers as how you got the amounts shown in this specification?

MR. APPELL: I object.

JUDGE ROSE: Sustained.

BY MR. SISKIN:

Q Do you have any sub-schedules which reconcile to the

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amounts shown for each of the parties in this appendices?

MR. APPELL: Objection.

JUDGE ROSE: What are you getting at, Mr. Siskin?

MR. SISKIN: I'd like to be able to examine, your honor, the method of computation that was utilized in this net backpay liability computation and the allocation thereof.

THE WITNESS: I'll be glad to explain it.

JUDGE ROSE: Okay.

BY MR. SISKIN:

Q Will you explain the computation?

A Yes.

I start with -- can we address ourselves to the bakers, because the same principle apply to the kettlemen, it's just a lower figure.

Q Yes.

A I start on the assumption or on the basis that in 1966, Mr. Siskin, a baker was paid $1239.76 out of the -- or, by the vacation and holiday fund and that absent the unfair labor practices, he would have received the same vacation and holiday benefits in 1967 and pro rata for the nine months of 1968.

In 1967, in fact such an individual received $224.44.

Therefore, the difference, or loss, between those two figures is $1,015.32, as set forth at the beginning of Appendix 1-D: Gross loss, $1015.32.

The proportion, or share, of that gross loss, which I then charged on Appendix 1-D, for example, to Golden and Tri-Boro, namely, 12 per cent and 3 per cent, is the same percentage figure -which appears on--which appears on Appendix 1-A of the backpay specification for the same individual, Abraham Baron, and so on with the other employees.

In other words, the percentage figures which appear in the D exhibits and are used to allocate the gross loss to the particular respondent, are the same percentage figures which appear on the corresponding A appendix for the same individual.

Q Isn't it true, though, that what was effected by these computations was, in effect, a second billing for the same thing that these individuals got from other employers?

A No, that is not correct, Mr. Siskin.

Q Well, isn't it -- isn't it true, -- isn't it fair to say, Mr. Levy, that those individuals that worked in the industry in 1967 and 1968 did receive computations and did receive payments for vacation and holiday benefits, period?

Didn't they receive benefits?

A I --

MR. APPELL: Your Honor, this whole line has been asked and answered already.

JUDGE ROSE: Well, that's true, Mr. Siskin.

MR. SISKIN: Well, your Honor, we are talking about allocations here.

We are talking about, in effect, an allocation a second time.

That's my contention.

That's my line of questioning.

It's a different theory than the line of questioning before.

I'm attacking it now on the question of duplication.

The first time the question is the records don't reconcile and you don't have a formula for the numbers that hae evolved.

In the second instance, what I'm trying to establish here, your Honor, is that these individuals did receive holiday and vacation pay.

JUDGE ROSE: That's right.

He said so.

MR. SISKIN: In effect, what we are doing now is we are computing for the same individuals --

JUDGE ROSE: Okay.

Mr. Siskin, argue that to me, don't argue that with Mr. Levy.

Just ask him questions of fact or what his assumptions were in arriving at his computations.

Don't argue with him about what you have been arguing presently with him about.

Let's proceed.

BY MR. SISKIN:

Q Now, Mr. Levy, with respect to the individuals that had their own businesses during the years 1967 and 1968, did you subtract anything in your computation for self-employment income?

A No.

If the self-employment is included in the -- is admitted as part of the interim earnings, then it is treated no differently in the D Appendices from any other employment.

Q Did you compensate or make any adjustments for any of the individuals who testified here that they were no longer members of the union during any point of 1967 or for the first three months of 1968?

A No, if there was such testimony.

Q Did you compensate for that individual who said he went to school during part of the backpay period that you've utilized?

A Who was that individual?

Q I believe it was Mr. Ostrofsky, one of the Ostrofskys.

Do you recall that one individual, the young chap, who testified he went back to school?

Were you here the day he testified he went back to school?

A I don't recall it.

I'm not disputing the testimony.

I would say only that if he was not available for employment in any particular period -- and I had knowledge of that -- I would have excluded -- I would have made a proper exclusion in the underlying computation and should have made a corresponding exclusion in the vacation and holiday benefits.

Q I believe that was Mr. Ronald Ostrofsky, Mr. Levy.

If you can address your attention to --

A I don't have any recollection of having made that kind of an adjustment for Ronald Ostrofsky in Appendix 26-D.

Q Did you make any adjustment for people that moved out of the area during 1967 or 1968?

A No.

To the best of my knowledge and belief, the computations in the D Appendices correspond, in terms of availability of employment, with the corresponding A appendices.

Now, if testimony has been developed in this hearing with respect to any particular individual to the effect that he wasn't available for employment whether because he moved away or went to school or for some other reason, and that was not known and not reflected in the admitted --

in the interim earnings or gross backpay as they appear in the other appendices, then there has been no corresponding adjustment in the D Appendices.

Q So, to the extent that subsequent testimony, that is to say, testimony subsequent to your original backpay specifications elicited any of the foregoing factors, that is, such as change in dwelling, change in residence, to a different state or taking one's self out of the labor market to go to school or the like, or because of withdrawals from the union, this schedule did not eliminate those individuals or such portion of their income as was represented by the testimony which indicated such factors had evolved; isn't that true?

A That is correct.

I would say that to the extent that as a result of testimony at this hearing, adjustments or corrections of net backpay, as propounded in the earlier -- in the original backpay specification to the extent that such adjustments are required, corresponding or pro rata adjustments would be required for the vacation and holiday pay alleged in the D Appendices.

Q Now, did you compensate for any individuals who switched from kettleman to baker?

A No, I did not.

They are treated here as kettlemen.

Q Now, do you know how the payment of vacation and holiday payments were made in prior years?

Do you know how many times a year they werepaid? And when they were paid?

A Well, it's my understanding that they were paid three times a year, I think.

I think it was once around the Passover season.

I think once in mid-summer.

I think once again toward the end of the year, somewhere around the Thanksgiving-Christmas season.

Q And do you know whether they were equal in allocations?

A I don't actually know.

I have no reason to believe that they were necessarily identical.

Q Well, didn't you in your computation for 1968, Mr. Levy, take a 75 per cent for three months?

A Yes.

Q Well, to the extent that a payment was made in prior years after September of 1968 -- after September, rather of any given year, didn't you, in effect, unduly allocate a 1968 payment under your theory?

A Well, I can't agree with your conclusion.

Q Well, didn't you take an arbitrary 75 instead of 66 per cent?

A I don't understand.

75 instead of 66?

Q Per cent.

If payments were, in effect, made at the end of a year and you, in effect took a flat 75 per cent for the year 1968, didn't you, in effect, enlarge the 66 per cent that would have ordinarily been paid up to that point for the period, as was paid for in the prior years?

A Well, I treated the vacation and holiday fund payments as, in effect, an annual payment and pro rated -- and allocated to 1968 a pro rata share, hat is, 75 per cent of the 1966 annual total.

Now, that's in fact what I did.

Q Do you know what, in fact, the union and management did when they computed their benefits for 1966 and prior years?

A I -- I don't know how, for example, they arrived at the $1239 disbursement for 1966.

Q Well, isn't it a fact that the union did the computing as to how much was given each year, that is, rather than management?

A I have no knowledge on that point, Mr. Siskin.

Q Did you ask the union, that is, prior to making this computation, for any of their past historical practices with respect to those payments or that kind of payment?

A No, I did not.

Q How did you arrive at the 224 amount that was shown in 1967, that is, as being paid?

A That is the amount uniformly shown to have been paid by the fund from such W-2 forms as were available to me evidencing payments by the fund in 1967.

Q Now, did you have any indication when you prepared this backpay amendment, Mr. Levy, as to how many months that covered, the $224.44?

A No, sir.

Q Did you make any inquiry of the union or of its employees?

A No, sir.

Q Now, did you know anything about how the union computed or would have computed the amounts each year of the holiday and vacation pay when you made this backpay specification?

A My only knowledge is that the contract, I believe, provides for the determination of these amounts by the joint employer-union trustees of the fund.

Q And did you utilize any of the minutes or any of the records of either management or of the union, with respect to past procedures and practices?

A No, sir.

Q Did you make any request of the union for such information?

A No, sir.

Q And was the 244.44 that you have shown one of the three payments that were made that you referred to as equal in scope?

A I don't recall having referred to any payments as being equal in scope.

Q Well, do you recall your earlier testimony that the payments were made three times a year?

A Yes, I recall that.

Q And do you recall whether you said at that particular time that they were three equal installments?

A My recollection is that I specifically said something to the contrary.

Q Well, do you know whether they were equal installments?

A No, I don't.

Q Do you know when the union made its determinaion every year as to how much the total for the year would be?

A No, I don't.

Q Did you ask for any of the records, either of management or union, as to the fund amounts at the beginning of 1967 or of '66 or of '68?

A No, I did not.

Q Do you know what the 224.44 amount represented and whether it represented production by boxes, benefits, or 3.50 per day computations?

A I have no independent knowledge on that point.

Q Do you know what period of time it covered?

A No, I can't say that I do.

Q Do you have any listing which reflects for those individuals who are shown in your backpay specifications, the $224.44, in your records, by names, the credit information?

In other words, with respect to 1967, $224.44, do you have an alphabetical or numerical sequence of any sort in your files as to what you did for the credit information for the original backpay specs?

A No, I don't have any separate listing.

Q Did you have any idea as to whether the funds were exhausted when payments were made or whether there was a surplus or a deficit when they were paid by the joint committee?

A I have no independent knowledge on that point.

Q Well, would it not have been significant if in fact surpluses or deficits were involved or carrypovers from preceding years when this computation would be made?

MR. APPELL: Objection.

JUDGE ROSE: Sustained.

BY MR. SISKIN:

Q Before you did these computations, did you have any signed statements from any of the employees with respect to how much they got for holiday and vacation pay during the years 1967 and 1968?

A No, sir.

Q So to that extent, Mr. Levy, this differs from the computation that you had made for the backpay gross amount, the original amount; isn't that correct?

A Well --

Q Isn't it true, Mr. Levy, that for the original computation that you had signed statements from the employees as to how much pay they had and interim earnings, etcetera, etcetera?

A Well -- no.

My computations on which the original backpay specifiaction was based -- excuse me.

Let me start my answer over again.

Q Yes, sir.

A The data in the original backpay specification are based primarily on social security records, W-2's, tax returns where we had them.

Yes, there were some documents signed by -- signed by the backpay claimants.

Frankly, I don't recall if there was any really significant wage information on them.

The data in the D Appendices, relating to vacation and holiday pay, Mr. Siskin, are predicated, basically, on the W-2's indicating the amounts they received from the vacation fund and supporting and corroborating testimony at the hearing.

Q Did you compensate for any of the gross earnings that were given to these employees in February of 1968 by the respondents when any of the employees returned to work?

A Well, that would -- that would -- those payments such as they were would have an effect to the extent that they are treated in the basic backpay computation as interim earnings and therefore reduce the amount of net backpay due.

To the extent, if any, that such payments reflected any vacation or holiday payments on a daily basis, that would be reflected in the -- on the interim earnings side of the computations.

Q Well, for the year 1966, is it not true, Mr. Levy, that the payment for holiday and vacation pay that was made, that those payments were made by everyone in the industry, uniformly, council or non-council members?

A As far as I know, they all contributed or were supposed to contribute to the fund.

Q And if in fact in the year 1967 non-union members did make a 3.50 per day computation in lieu of the per box computation, wouldn't you, in effect, be treating the council members completely different from the non-union members when it came to the computation of this backpay specification?

A No, I don't think so.

I think I'm treating them the same.

Q Well, wouldn't you, in effect, Mr. Levy, be subjecting the council members to a higher rate of vacation and holiday pay than the non-council members who had in fact been paying the $3.50 per day?

A I lost you.

MR. APPELL: I object.

A Could you repeat the question?

MR. APPELL: I object.

JUDGE ROSE: Well, that is argument, Mr. Siskin. Just ask him the facts.

BY MR. SISKIN:

Q Now, do you know whether seniority played any part in the computation of this backpay specification, according to the 1966 contract?

A I don't believe seniority, as that term is normally used, played a role.

It's my understanding, that, for example, all bakers who worked full time,however the trustees defined that, that is, four days or five days, got the same amounts of vacation money during the year.

Q Do you recall whether you ever saw the full agreement that was executed in 1967 by any of the members of the council with respect to the collective bargaining agreement?

MR. APPELL: Objection.

JUDGE ROSE: What about it, Mr. Siskin?

A I --

JUDGE ROSE: Don't answer the question, Mr. Levy.

MR. SISKIN: I'm going to ask the witness to identify whether this was the kind of agreement or the agreement that he saw with respect to --

JUDGE ROSE: What difference does it make?

MR. SISKING: Well, it's my contention, your Honor, that this was the agreement that was in force from February 1, 1967 throughout the industry.

JUDGE ROSE: I suggest you put that into evidence. But --

MR. SISKIN: Well, I'm leading to that, your Honor. I'm having this witness testify to it.

Would you please mark a pro forma agreement dated February 1, 1967, by the Bagel Bakers Union, Local 338, and unnamed employers.

(The above-referred to document was marked Respondent's Exhibit No. 61 for identification.)

BY MR. SISKIN:

Q I show you Respondent's Exhibit 61 for identification, Mr. Levy, which is a memorandum of agreement, pro forma.

Does this refresh your recollection?

JUDGE ROSE: No.

MR. SISKIN: I'm sorry.

JUDGE ROSE: Just ask him if he can identify it.

Was he a party to the negotiations?

Was he involved in the negotiations?

Has he ever seen it before?

BY MR. SISKIN:

Q Have you ever seen this agreement before, Mr. Levy?

A I don't believe I have ever seen this document before, until --

JUDGE ROSE: Okay.

THE WITNESS: Let me finish.

A -- until sometime during the course of the hearing, this or something similar.

At that time, this or something similar may have been shown to me.

JUDGE ROSE: Were you involved in the preparation of that document, Mr. Levy?

THE WITNESS: Absolutely not.

JUDGE ROSE: Okay.

Go ahead, Mr. Siskin.

Make your offer.

MR. SISKIN: I offer this in evidence, your Honor.

JUDGE ROSE: Any objections?

MR. APPELL: Yes, I object.

JUDGE ROSE: Sustained.

It will be rejected.

(Respondent's Exhibit No. 61 for identification, was rejected.)

MR. SISKIN: Your Honor, may I reserve the right to introduce this again?

JUDGE ROSE: If you can lay a foundation for its authenticity, yes.

MR. SISKIN: May we go off the record, your Honor? There is one more witness who is going to testify to this agreement this afternoon, I believe.

JUDGE ROSE: Anything further of Mr. Levy?

MR. SISKIN: No, no further questions of Mr. Levy.

JUDGE ROSE: Mr. Appell?

MR. APPELL: One question, your Honor.

REDIRECT EXAMINATION

BY MR. APPELL:

Q Mr. Levy, the $224.44 figure from the 1967 vacation pay, was that reflected in the interim earnings data as set out in the backpay -- as set out in the original backpay sepcification?

A No, no, no.

Q When you -- strike that.

MR. APPELL: No further questions.

JUDGE ROSE: I have a couple of questions for you, Mr. Levy.

THE WITNESS: Yes, sir.

JUDGE ROSE: This may be repetitious of your testimony, but so that I'll be sure that I understand it.

The amount, $1,239.76, is the amount of vacation/holiday pay received by the Bakers in 1966.

Is that correct?

THE WITNESS: That is correct.

JUDGE ROSE: Now, does that figure reflect contributions made to the fund by both council and non-council members?

THE WITNESS: To the best of my knowledge and belief, that is the case.

JUDGE ROSE: It does?

THE WITNESS: It does.

JUDGE ROSE: The specification, therefore, does not assume that the entire amount, $1,239.76, would be paid to these claimants by just the council members?

THE WITNESS: That is correct.

JUDGE ROSE: Okay.

Now, Mr. Levy, a claimant who works in this industry, who worked in this industry in 1967 for non-council members. presumably vacation and holiday contributions would have been made.

Is that correct?

THE WITNESS: Presumably, yes.

JUDGE ROSE: That is a reasonable assumption, is it not?

THE WITNESS: Yes.

JUDGE ROSE: Did you calculate in any way how much contributions were paid by non-council members for whom these various claimants worked?

THE WITNESS: No, sir, I have no way of making such a computation.

JUDGE ROSE: In 1967 for these employees, these claimants, for whom contributions were made by the non-council members, presumably they got some pay out, too, did they not?

I mean, that would be an assumption, I guess.

THE WITNESS: I didn't quite understand the question.

JUDGE ROSE: Okay.

If a claimant worked in 1967 for a non-council member and if contributions were made by that non-council member for that particular claimant, then that employee would have received the vacation pay in 1967?

THE WITNESS: Well, as I understand it, your Honor, if we are talking about the period prior to the three and a half dollars a day system, all contributions by employers went into the fund and were pooled, whatever the source, council or non-council.

JUDGE ROSE: Yes.

THE WITNESS: And the trustees thereafter made disbursements to the employee beneficiaries of the fund.

JUDGE ROSE: But at some point in time, then the new computation of $3.50 a day went into effect, did it not?

THE WITNESS: That's my understanding, at sometime or times in 1967.

JUDGE ROSE: And as to those claimants who worked in the industry in 1967 for non-council members, on the principal backpay specification, is that $3.50 per day reflected as interim earnings?

THE WITNESS: Yes, sir.

JUDGE ROSE: It is?

THE WITNESS: Yes, sir.

JUDGE ROSE: And how is it reflected?

THE WITNESS: Well, your Honor, it's incorporated in the interim earnings data.

Now, this answer is -- let me explain it -- is based on one or more premises, namely, that the employers did pay the three and a half dollars -- did pay at the rate of three and a half dollars per day worked, that they made the payment directly to the employee, that they made it at the end of the work week, that they incorporated -- that they added it on to his conventional piecework earnings and that they, for Social Security purposes, treated it like they should have, like any other wage payment, and that accordingly it's reflected in the Social Security and W-2 forms upon which the basic backpay specification is founded.

JUDGE ROSE: Okay.

Referring now to Appendix 33, now Appendix 33-D under Joseph Silverman --

THE WITNESS: Joseph Silverman is 36-D.

JUDGE ROSE: I'am sorry, 36-D, right.

Then also refer to 36-A, because I am going to ask you about -- that's also Joseph Silverman, isn't it?

THE WITNESS: Yes, sir.

JUDGE ROSE: In 1966, he had earnings from council member Benson of $1,490.84; okay?

THE WITNESS: Yes.

JUDGE ROSE: Now, he also had earnings from non-council members of $14,901; right?

THE WITNESS: Yes, sir.

JUDGE ROSE: That's what the specifications say, don't they?

THE WITNESS: Yes.

JUDGE ROSE: Out of those two figures then, Mr. Levy, would presumably be his total industry employment from which contributions for the vacation/holiday pay were made; is that right?

THE WITNESS: That's correct.

JUDGE ROSE: And then he received the $1,239.76 based upon that amount of employment; is that a fair statement?

THE WITNESS: Excuse me, sir, I didn't follow that last -- your last calculation.

JUDGE ROSE: Well, did he receive the $1,239.76?

THE WITNESS: Yes, he received that in 1966.

JUDGE ROSE: Right.

THE WITNESS: Yes, yes.

JUDGE ROSE: Now, we come down to 1967.

And do you find that he had a gross loss of holiday and vacation pay of $1,015.32?

THE WITNESS: Yes, sir.

JUDGE ROSE: How did you arrive at that figure?

THE WITNESS: I arrived at that figure by subtracting from 1239.76, the holiday and vacation pay actually paid him in 1966, subtracting from that, sir, the sum of 224.44, the amount of vacation and holiday pay he actually received from the fund in the year 1967.

That left the figure of 1015.32.

JUDGE ROSE: To be paid by Benson?

THE WITNESS: Which is here charged to Benson.

JUDGE ROSE: So you are saying, Mr. Levy, by your calculations that had there been no unfair labor practice, Mr. Silverman would have received from Benson contributions of $1.015.32 but would have received wages of only $1,890.84; is that right?

THE WITNESS: The figures speak for themselves.

JUDGE ROSE: That's how you calculated it, didn't you?

THE WITNESS: Yes.

JUDGE ROSE: That's not right, is it, Mr. Levy?

THE WITNESS: Well, it isn't as bad as it all sounds, your Honor.

The proposition is that in 1967, Silverman would have received the same vacation benefits of $1239.76 that he got in 1966.

In fact, we know that he got $224.44 from the fund.

We also know or believe or presume that he received an additional amount unknown or unspecified in terms of vacation benefits, which are reflected in Item B for 1967 as earnings from non-council members.

I'm referring now to Appendix 36-A.

JUDGE ROSE: Yes.

THE WITNESS: And that there is no corresponding figure, or value, for 1967 vacation and holiday pay in Appendix 36-A, which results -- which is how we arrived at the deficit of $1015.32.

JUDGE ROSE: Well, here's the thing, Mr. Levy --

THE WITNESS: Now, I recognize, your Honor, the problem -- the problem you raise of allocating 100 per cent of that loss to Benson.

It may well be that in this particular case --

this is an unusual, an atypical case, your Honor.

JUDGE ROSE: I don't believe it is, Mr. Levy.

I think that it --

THE WITNESS: There is such a proportion of total 1966 earnings are attributable to that council member.

JUDGE ROSE: I just want to know what you are asking me to do, what the General Counsel is asking me to ;do here.

As I understand it, the issue that's before me for a decision is how much money is it going to take to make these individuals whole for the losses they suffered as a result of the discrimination against them.

THE WITNESS: Yes, sir.

JUDGE ROSE: It is incumbent, however, upon me not to make them more than whole.

THE WITNESS: I agree.

And it's incumbent upon the Region, or the General Counsel, not to do so, either.

And may I point out, your Honor, that in Appendix 36-C, also relating to Joseph Silverman, we have limited the liability of Benson to the amount of wages paid to the claimant in the base period, although the formula without that adjustment would have resulted in a larger liability.

JUDGE ROSE: It appears to me, Mr. Levy, that implicit in your assumptions in creating this backpay specification for the loss of wage and vacation and holiday pay, you're allocating the whole loss on the council members when in fact many of these employees in 1966 had earnings, and therefore contributions, both from council and non-council members.

So, what you are saying is that the original $1,239.76 came only from council members; that's your assumption.

In fact, Mr. Levy, some portion of that came from non-council members in 1966, as to most of these employees.

THE WITNESS: Well, I would respectfully disagree, your Honor, with certain assumptions that you have attributed to me.

It is perfectly true, I'm well aware of the fact that contributions to the fund were made by both council members and non-council members.

The premise of the vacation and holiday fund computation is that the total benefit to the claimants for the backpay period would have been the same in 1967 and '68.

JUDGE ROSE: Excuse me, Mr. Levy, let me stop you at that point.

You're assuming that the vacation and holiday pay would have been the same in 1967 as it was in 1966.

In fact, however, each of these employees who worked for a non-council member in 1967, received some vacation and holiday pay pursuant to the new formula, did they not?

THE WITNESS: Correct, yes.

But as a --

JUDGE ROSE: So you don't know how much that ought to be set off against the vacation and holiday pay even though it's treated as interim earnings?

THE WITNESS: But in fact, your Honor, it is being offset, as I explained in my response to one of your earlier questions.

Even though we don't know the actual amount, in fact, it is incorporated in these interim earnings figures.

Therefore, your Honor, it is -- it is actually being offset against what is now claimed here.

It has been offset and we are correcting an error deficiency in the original backpay specification by putting in that gross figure.

JUDGE ROSE: Okay.

Anything else of this witness?

MR. APPELL: Nothing, your Honor.

JUDGE ROSE: Mr. Siskin?

MR. SISKIN: Yes, your Honor.

RECROSS_EXAMINATION

BY MR. SISKIN:

Q With respect to this amendment to backpay specification and your manner of apportionment, I have just a few questions, Mr. Levy.

A Yes, sir.

Q Will you tell us how many individuals you allocated a hundred per cent of the backpay specification attributable to the vacation and holiday pay?

A Well, I really don't know.

I would just have to go through and --

Q Would you just take a quick count on that, please?

MR. SISKIN: I think that bears, your Honor, on the reasonableness of the approach of the NLRB on this matter.

A Appendix 8-D, Samuel --

Q You don't have to mention the names.

JUDGE ROSE: It speaks for itself, Mr. Siskin. Let's go on.

Is that readily ascertainable from the specification?

THE WITNESS: You just look through and pick out wherever there's a hundred per cent.

I gather that's where he's getting at.

JUDGE ROSE: Okay.

Go on, Mr. Siskin.

BY MR. SISKIN:

Q Will you look at your 1968 apportionments of your vacation and holiday and backpay specification, Mr. Levy.

A I have them.

Q Didn't you, sir, in effect, when you made those apportionments, in effect, charge those individuals that had the -- that had the notation a hundred per cent, for the entire vacation pay and holiday pay, according to your method, for the year 1968, since you didn't,in effect, allow any subtraction under your formula for benefits paid?

MR. APPELL: Objection.

JUDGE ROSE: Overruled.

If you can asnwer it, please do.

BY MR. SISKIN:

Q For 1968,

A I'm sorry, I didn't understand that question at all, Mr. Siskin.

Q I'll rephrase it.

Perhaps the question is too long.

For the year 1968, Mr. Levy, for those individuals that you've marked a hundred per cent next to their names --

A Yes.

Q -- in your Appendix --

A Yes.

Q -- and I think if you would count them, you would find 17 --

A Whatever the number is.

Q -- didn't you, in effect, Mr. Levy, charge those employers that are next to the 100 per cent amounts, for the entire holiday and vacation pay that this man, or these individuals, would have received, according to your formula, from the entire industry, since, in effect, you have no subtraction for the year 1968 at all for payments made?

MR. APPELL: Objection.

JUDGE ROSE: Overruled.

Hand me one of those, will you, Mr. Levy?

THE WITNESS: Yes, sir (handing).

A Well, in 19 -- I have difficultly following your question because 1968 isn't treated any differently from 1967.

And the interim --

Q Well --

A -- and what I've said previously about interim earnings reflecting any vacation benefits paid at the rate of $3.50 a day applies to 1968 interim earnings as well as to 1967 interim earnings.

Whatever -- there's certainly no difference -- let me answer your questionthis way:

There's certainly no difference in the treatment of 1968 earnings from 1967 earnings.

If the formula is good for 1967, it's good for 1968.

If it's bad for 1967, it's bad for 1968, for precisely the same reasons.

There's no difference in principle in treatment of those two years.

Q Well, Mr. Levy, if that were true, wouldn't you, in effect -- if your principles were the same for both years, wouldn't you, in effect, have given credit as you did in 1967?

If you look in 1967, you gave credit for contributions that were made for both council employers and non-council employers, yet in 1968 there were contributions that may have been made by non-council employers and yet you showed zero.

If you were comparable or compatible in your comparisons, wouldn't you have had, in effect, a number here for payments made by non-council members?

In other words, if 224.44 for '67 were contributions made by council and non-council members, whatever it might have been, you would have had to have had some allocation?

A Oh, you are referring to this 224?

Q Yes, if you compare that.

A Well, that --

Q So, sir, to that extent, isn't your computation different for 1967 than it is for 1968?

In 1967, didn't you --

A Well, only to the extent that the vacation fund in fact made a contribution of -- made a disbursement of $224.44 to employees and did not make such a disbursement in 1968.

Q Well, didn't --

A But that's a fact over which I have no control.

It doesn't change the principle of the computations.

Certainly the respondents are entitled in 1967 offset of $224.44.

In 1968, the corresponding disbursement from the vacation fund zero.

Q And during the year -- and these contributions that you have shown in 1967 for $224.44 as compared to the 1968 when it was shown for zero, didn't the 1967 reflect non-council contributions to an overall pooled fund and didn't the year 1968 show nothing, according to these computations, when in fact contributions to a vacation and holiday fund were paid by non-council members during the year 1968?

To that extent, isn't it fair to say, Mr. Levy, that you used different principles for 1967 than you did for 1968?

A No, I can't agree with your conclusion.

Q Okay.

MR. SISKIN: I have no further questions.

JUDGE ROSE: Okay.

Q Mrs. Lewis, do you recall when you took back the union employees?

A Yes.

Q And when you took back the union employees, did you have to sign some sort of agreement with the union?

A Yes.

Q And what did that union agreement -- and when was that date, by the way?

A They came back to work on a Tuesday night.

It was -- Mr. Levy has the date.

I think it was the -- what was it? Was it the 5th?

On a Tuesday night it was.

Q What months?

A In June.

Q June of what year?

A 1967.

Q Okay.

And did you and the union enter into an agreement with respect to vacation and holiday pay?

A Yes.

Q What was that agreement?

A They were going to get 3.50 for a baker and 2.50 for a kettleman, or a helper.

Q And was that pursuant to negotiation between you and the union?

A No.

That was the industry, everybody was paying that at that time.

Q In 1967?

A Right.

MR. APPELL: Your Honor, I move to strike the statement that everyone in the industry was paying that, unless the witness can --

JUDGE ROSE: Sustained.

Proceed, Mr. Siskin.

MR. SISKIN: All right.

BY MR. SISKIN:

Q Can you tell us, Mrs. Lewis, did the union take back a copy of that agreement that reflected that?

Did you sign an agreement with the union?

A Yes.

Q And did the union take back a copy of that agreement?

A Right.

Q Who signed the agreement in behalf of the union?

A Well, Mr. Laskowitz brought it.

He was supposed to mail it back to us.

Now, I don't remember if he actually signed it in front of us or it was just agreed that these were the terms.

It was the same contract for everybody.

We didn't have a special contract.

Q All right.

A And that's why I would say that for everyone, that's why I would know that the others had the same.

There wasn't a different contract for this one and a different one for this one.

Q And how did you know that others in the industry had that agreement?

A Because the men who worked by us workedin other places, too, and they would get the same rate of pay if you worked here or you worked here, wherever you worked, you know, everyone paid the same.

Q And was this discussed between you and Mr. Laskowitz as to it being the practice in the industry?

A He didn't say to me -- he said that this is what it is, if you want the men to come back to work, you know, you have to pay them 26 cents a box and you have to pay the man at the end of the week $3.50 a day for every day that he worked.

Q And did the agreement provide for 26 cents a box?

A 26 cents a box, yes.

Q On a hundred box basis?

A Yes.

Q As finally executed?

A Yes.

Q Was that on a per hundred basis or was that per box regardless of the hundred boxes minimum?

A We always had more than a minimum.

I don't remember — you know, we never had that problem.

Q But was the rate 26 cents a box?

A A box, right.

Q When it was finally executed?

A Right.

Q And was the — and what was the formula that was used, Mrs.Lewis, for vacation and holiday pay?

A Every day that a man worked , you had to pay him $3.50 included in his check for each day that he worked.

If he worked four days, then he gets $14. If he worked three days, he got $10.50.

Q And how about kettlemen?

A They had $2.50 a day.

Q And pursuant to that arrangement, Mrs. Lewis, did you make payments to the holiday and vacation fund?

MR. APPELL: I object to that, your Honor.

I --

JUDGE ROSE: Sustained.

BY MR. SISKIN:

Q And following that, Mrs. Lewis, did you make payments to the holiday and vacation fund?

MR. APPELL: Your Honor, I object to this entire line of questioning.

Flatlands was out of the picture in June of 1967.

And what its arrangement was with the union is not relevant to the remainder of -- either to Flatlands in this case or certainly to the rest of the respondents, in any case.

JUDGE ROSE: Overruled.

But I think you are assuming a fact, Mr. Siskin, that is not in evidence.

MR. SISKIN: No. I'm referring to the arrangement that she made, your Honor.

That's my line of questioning, with respect to what she made -- with respect to what payments she made --

HEARING OFFICER: To the fund?

MR. SISKIN: Yes.

HEARING OFFICER: Well, ask her that.

MR. SISKIN: I just did, your Honor.

BY MR. SISKIN:

Q Did you make payments to the fund?

A I was under the assumption that there was no more fund any more, because there were a lot of bakeries that weren't council members and nobody paid, so there was no more fund.

Q All right.

So what did --

MR. APPELL: I move to strike that unless a foundation can be laid.

JUDGE ROSE: Sustained.

BY MR. SISKIN:

Q Will you tell us what you did to conform to the 3.50 and 2.50 payment method?

Did you make payments at the rate of 3,50 per day and 2.50 per day?

A Right, whoever worked, in his check, included in his check was added either 3.50,10.50 or $14, whatever he worked.

Q Was that in lieu of the vacation and holiday fund that had existed prior to that time?

A Before, right.

Q Now, when Mr. Laskowitz came over to your office, what did he say to you and what did you say to him after you said you were willing to take back the employees to work?

A Well, he said that we would have relief.

The problem was that we couldn't keep the men and keep the route.

He said that we would have a relief and that my husband was going to be allowed to get paid for what he was making and the men would be getting less money and we wouldn't have the holiday and vacation fund any more.

Q And did he say anything else to you as to any other shops at that time?

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MR. APPELL: I object.

JUDGE ROSE: On what basis?

MR. APPELL: First of all, your Honor, it's leading. Secondly, it calls for hearsay evidence.

JUDGE ROSE: Sustained.

MR. SISKIN: No further questions of the witness, your Honor.

JUDGE ROSE: Any cross-examination, Mr. Appell?

MR. APPELL: No, your Honor.

THE WITNESS: Could I just ask Mr. Appell how you could just have something with a holiday and vacation fund that I'm curious about?

If other people were sharing into this amount of money, non-counc[illegible] shops and that's where you came up to a grand total for the year before and the year before, now how could you penalize everybody vor that when they are not chipping into it there, they weren't paying, there was no fund any more?

So how could you say they were missing 2000? Let's say if they were missing $2000 a year, everyone would have chipped in.

Now, since there were just as many non-council shops as council shops, how could you say you have to pay for them when they were in business and they weren't contributing to that any more?

JUDGE ROSE: Mr. Appell, do you have an answer for that?

MR. APPELL: Well, your Honor, we have set forth in the backpay specifications, as best we could, the amounts that we thing the respondents were liable for.

It's impossible at this point in time, your Honor, to allocate.

We are simply issuing the backpay specification on the assumption that but for the discrimination, these employees would have been working for the council employers and that they are responsible for the loss.

JUDGE ROSE: He says he doesn't have an answer to your question, Mrs. Lewis.

(Laughter.)

THE WITNESS: Thank you.

JUDGE ROSE: You are excused, Mrs. Lewis.

(Witness excused.)

MR. APPELL: I would note, your Honor, that respondents in this case have not come up with what we believe to be their burden, namely, an alternative solution or a formula.

We believe that's required by the rules respecting pleadings.

JUDGE ROSE: Well, I'm not sure that I'm going to accept that statement of law, Mr. Appell.

I think it's a burden of the General Counsel to come

come forward with a reasonable way to determine how much backpay would be due or how much these people would have been entitled to but for the discrimination against them.

I think if the general counsel can't establish that prima facie, I'm not so sure that the respondent has any burden.

Let's go forward, shall we?

MR. SISKIN: Mr. Stone.

Whereupon,

LIONEL STONE,

was called as a witness herein, and having been first duly sworn by the Administrative Law Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SISKIN:

Q Would you please state your full name for the record.

A Lionel Stone.

Q What's your home address?

A 107 South Mary Avenue, Sunnyvale, California.

Q Mr. Stone, how long were you engaged in the bagel business as a baker?

A Many years. I -- many years.

Q And have you ever been in business for yourself?

A Yes. I am right now.

Q When did you go into business for yourself?

is out of business there probably will be no liability.

JUDGE ROSE: No liability?

MR. APPELL: I will have to check further before I give you a definite position.

MR. SISKIN: I might add, that under New York State Law there is a statute which I have come across which says there is a two year statute of limitations as to unpaid labor claims against a stockholder, the ten highest stockholders, I believe.

I don't believe it was in existence at that point of time, but the statute of limitations has expired on that particular statute, I submit that to you.

JUDGE ROSE: You are not claiming that Culver, MacDonald is a successor corporation that is liable for this back pay?

MR. APPELL: No, we haven't.

JUDGE ROSE: Proceed, Mr. Siskin.

BY MR. SISKIN:

Q Now, with respect to your financial operations for 1966, '67 and '68.

Did you have an accountant?

A Yes.

Q For the concern?

A Yes.

We are talking about Benson Bagel Bakeries?

Q Yes.

A Paul Kalkstein.

Q Is he your brother?

A Yes.

Q Was he an accountant during '66, '67 and '68?

A Yes.

Q Does he have something that prevents him from coming to court today?

A My brother had a tumor removed from his brain and I asked him if he could come to court to prove the validity, but he said it was too much of a strain for him and I said I would do what I can.

We did prepare most of these papers but I am not an accountant, I am a baker. It is a little Greek to me, but I can try.

Q Did you bring your ledgers with you today?

A I did.

Q Were your ledgers the source of this information?

A Absolutely.

Q Were you present when your brother prepared these?

A Yes.

Q You saw him prepare these numbers, extracting them from the ledgers?

A Absolutely.

MR. SISKIN: Would you mark this as an exhibit for identification?

JUDGE ROSE: 63.

(Document marked Respondents' Exhibit 63 for identification, as of this date.)

Q Does this exhibit reflect comparative sales, flour purchases and payroll analysis for the years '66, '67 and '68?

A That's right.

MR. SISKIN: I ask this be introduced in evidence.

JUDGE ROSE: For what company?

MR. SISKIN: Benson, only Benson Bagel Bakeries.

MR. APPELL: The only objection I have, your Honor, is to the footnote, there is an asterisk and a footnote for 1968.

MR. SISKIN: I can go further than that --

MR. APPELL: Other than that, I have no objection.

MR. SISKIN: I can let that go in without that, your Honor.

Your Honor, I have the ledger here for the source of that year and I am going to elicit testimony now from the witness with respect to the footnote, if my adversary insists.

JUDGE ROSE: Respondents' Exhibit 63 will be received into evidence except for the asterisk.

Although I would note for the record that this witness testified basically to the substance as contained in that footnote previously.

MR. SISKIN: Thank you.

Mr. Kalkstein, would you look at the purchases -- I am going to ask that this be marked, it is a general ledger for the year 1968 of Benson Bagel Bakery.

(Exhibit 63 for identification was received into evidence as of this date.)

(Diary of Benson Bagel Bakery was marked Respondents' Exhibit 64 for identification, as of this date.)

Q Now, Mr. Kalkstein; with respect to the purchases ledgers account in that ledger, will you tell us how much the purchases other account reflect for the year 1968?

A $37,861.77.

Q Is it fair to say that if you assumed no markup on the purchases others and I take it that means groceries?

A That is true.

Q If you assume no markup on the purchases and if you subtracted that $37,861 from your sales you would get a figure which at the maximum would be begal sales, isn't that correct?

A That is correct.

Q And if in fact you had a markup bagel sales would be lower, isn't that correct?

A That's correct.

MR. SISKIN: I have no further questions of the witness at this point.

JUDGE ROSE: Mr. Appell.

EXAMINATION

BY MR. APPELL:

Q When was the last year that Culver Bakery was in business?

A About the time of the strike, I think it was.

Q Is Culver, MacDonald a member of the council?

A For a period of time, yes.

Q Since how long?

A It would be hard to say. It was after he bought the business, after he bought the stock, the equipment.

Q Who are the principals in that company?

A Jerry Lemberg and Fred Lemberg.

MR. APPELL: I have no further questions.

JUDGE ROSE: Mr. Siskin?

MR. SISKIN: I have no further questions.

JUDGE ROSE: I have a couple.

BY JUDGE ROSE:

Q Do you recall how much you sold bagels for in 1966?

A Offhand right now, no. Maybe they can help me, I don't know.

Q There has been testimony that you were selling them for about 7 cents a piece or 84 cents a dozen?

A I don't remember, your Honor.

Do you know what is uppermost in my mind today, is a pound of sugar. But as far as the bagels, I was reprimanded by my council as to that effect meaning how come I don't remember wages as to what they were ten years ago.

Since 1968 we have been in groceries.

Q In 1966 if you can remember and in 1967, did you have a different price structure for wholesale, sale of bagels or retail or were they the same?

A Wholesale was always less than retail and there were two categories of wholesale. There was wholesale and wholesale wholesale and I said in my testimony that I subcontracted for the Tri-Boro when I serviced Food Fair and that was a lower price than the wholesale and we had other people known as jobbers, they would pick up the leftovers overnight and that would be less than that, but we would rather sell it than throw it away.

There were different prices.

Q Do you have any judgment at this time of what the relative price variation was?

A Not really, I just don't remember.

JUDGE ROSE: That's all I have.

Anything further of this witness?

MR. APPELL: No, your Honor.

MR. SISKIN: No, your Honor.

JUDGE ROSE: You are excused.

MR. SISKIN: I call Mr. Madorsky.

JUDGE ROSE: Have a seat. Let me remind you that you have been previously sworn and you are still under oath.

LOUIS MADORSKY,

having been previously duly sworn, resumed the stand and testified further as follows:

JUDGE ROSE: State your name and address for the reporter.

THE WITNESS: Louis Madorsky, 18 Salem Road, Rockville Centre, Long Island.

EXAMINATION

BY MR. SISKIN:

Q Mr. Madorsky, did you bring with you certain records today that you had been requested to bring if you could find them by counsel for the National Labor Relations Board?

A I did. They are up here.

Q Where?

A Here, they are in front of Mr. Appell, I think.

Q Now, do you recall what your categories of wholesale and retail were for the years '66, '67 and '68, to the best of your recollection?

A In '66, I can go back one year further, I can go back one year in '65 we changed our complete operation from a strictly wholesale bakery and we moved into the retail area.

In '64 and '65 that is. By June of 1965 we had completed the move from three strictly wholesale bakeries to three wholesale; wholesale wholesale bakery and a retail bakery.

Q Can you differentiate between the wholesale, wholesale-wholesale, retail as to what those terms mean to you?

A In the area of the wholesale-wholesale, we had customers who were considered jobbers and wholesale bread bakeries who we used to deliver bagels to their particular establishment and they put them on their trucks and they sold them to their particular customers all over the general area.

For those particular people we gave a very low price because they were like a bulk sale. We make one drop-off and they would distribute them among maybe ten or fifteen trucks.

That would be the wholesale, wholesale.

In the category of wholesale it would be supermarkets depending on how big a chain they were which would create a differentiation in price and the smaller supermarket, then the delicatessens, then the bakeries and luncheonettes would all be in the wholesale area. Each one more or less commanded a different price structure depending on the amount of bagels they took.

The retail would be the person coming to our establishment and buying bagels right over the counter.

Q To the best of your recollection, in the latter half of '66 what were your price tiers, or your price levels for those three types of customers?

A You mean specifically?

Q Yes, for each bagel for the wholesale, wholesale-wholesale and retail, to the best of your recollection per bagel or dozen or however you can remember?

A I am not too sure about the particular date or the time but I think it would be either 7 or 8 cents a bagel on the retail level.

Then going down the line towards the wholesale and the wholesale, wholesale. I think it would be percentage-wise because as I stated before it would be broken down as to the amount of bagels the individual took.

If a customer like the wholesale, wholesale took a big bulk we would give him a low price such as the bagels leftover at the end of the day, we would almost give it to them, and going up the ladder that way, the price structure would be different.

Q Could you give a fair estimate as to what the prices were for the wholesale, wholesale and for the wholesale?

A It would be 60% less than the retail price.

Q You would in effect subtract 60%?

A I would say 40 or 50 cents a dozen, I think so, it's hazy in my mind.

Q Would it be less or the price would be 60%?

JUDGE ROSE: He said 50%.

THE WITNESS: I said 60, your Honor.

JUDGE ROSE: I am sorry.

THE WITNESS: About 40 or 45 cents a dozen for the wholesale, wholesale. Then going up the ladder according to the amount of bagels, the individual customer took. I think the supermarkets were paying 50 or 55 cents a dozen, I am not positive, but I think it is in that area.

Q What was the price your competition effected so as to deprive you of those accounts?

A It depended on who the competition was. If they were not unionized it is unfair, they could go down to 30 cents a dozen.

I couldn't compete with them.

Q Who in fact did give the best prices, if anybody?

A I think in my previous testimony I mentioned a bakery up in Throgs Neck, they started lowballing right away, using that expression meaning a lower price all over the City.

MR.APPELL: I move to strike this testimony.

THE WITNESS: Everybody was affected by them. That is the one that affected me and there were a couple of bakeries in our area that were associated with another local; they did the same thing.

MR. APPELL: I move to strike that testimony.

JUDGE ROSE: Sustained.

MR. SISKIN: I have no further questions of this witness.

We have certain exhibits, Mr. Appell, which you can refer to and I may object to them.

JUDGE ROSE: Mr. Appell.

MR.APPELL: If I may have a moment, your Honor, to look at some exhibits.

JUDGE ROSE: We will be in recess for about five minutes.

(Short recess taken.)

JUDGE ROSE: On the record.

MR. APPELL: I have no questions, your Honor.

JUDGE ROSE: Let me ask a couple of questions about the employees that were required to bake 100 boxes of bagels.

BY JUDGE ROSE:

Q There has been some testimony along these lines and I just want to make sure I have it straight in my own

JUDGE ROSE: On the record.

MR. APPELL: Your Honor, I have nothing further.

I made an attempt to locate certain rebuttal witnesses and they are just not available. So I will have to rest at this point.

JUDGE ROSE: Is there anything further?

MR. APPELL: I would like to note, your Honor, that Mr. Levy has worked out a tentative ultimate proposal concerning the vacation and holiday pay formula. I would submit this alternative as part of the brief, if that is your Honor's wish.

JUDGE ROSE: That would be an appropriate way to do it, I think.

MR. SISKIN: I have only one objection to that, your Honor.

I have no way to cross examine or even to rebut that and I think it would be highly prejudicial to me.

MR. APPELL: I will provide counsel with a copy now of Mr. Levy's notes that spell out the reasons and methods of computation and some examples.

JUDGE ROSE: Very well, give that to Mr. Siskin and Mr. Siskin be advised that this is General Counsel's alternative or method of the vacation, holiday pay specification and you can meet it in your brief.

MR. SISKIN: As I understand it, we are not going to exchange briefs. I mean, we are not going to respond to them.

JUDGE ROSE: Briefs will be submitted simultaneously.

MR. SISKIN: Okay, your Honor.

I renew my objection, for that reason I am put in the peculiar position of having to anticipate something that may never be introduced.

JUDGE ROSE: He is going to argue for this formula in his brief and you have what it is he will be arguing about. So you can meet that argument in your brief.

Anything further, gentlemen?

MR. SISKIN: Just the summation, your Honor.

JUDGE ROSE: Mr. Appell, do you want to make an oral presentation?

MR. APPELL: I would, your Honor.

JUDGE ROSE: I will let you go first.

You may proceed.

MR. APPELL: Your Honor, we will probably be submitting a brief so I will try to be short in my remarks.

I just would point out that as far as General Counsel is concerned, its explication and enunciation of the back-pay formula, the determination and the specification is reasonable and it was an honest attempt to try as best as possible to arrive at a formula that would be equitable for all parties concerned to make the back-pay claimants

State of New York,
County of New York,
City of New York—ss.:

Stephan Axelrod being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of January, 1977, he served 1 copies of the within Appendix for Petitioner on JOHN C. TRUESDALE, ESQ. Executive Secretary of the National Labor Relations Board

the attorney for the Respondent N.L.R.B. by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at ~~90 Church~~ Christopher and Washbnton Street, Borough of Manhattan, City of New York, directed to said attorney at No. National Labor Re;ations Board, Washington, D.C. 20570 that being the address designated by him for that purpose upon the preceding papers in this action.

Stephan Axelrod

Sworn to before me this
26th day of January, 1977.

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978

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